RECORD, CASE No. 13,692.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 122.

THE CONTINENTAL STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. BURKE, ADMINISTRATOR OF TIMOTHY KELLY, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED OCTOBER 2, 1889.

35 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The City Council of Augusta, Georgia, against Harriet Cazenove Jones and Frank Cazenove Jones, as adm'rs, with the will annexed, of Gazaway B. Lamar, deceased, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 13,728. S. New York C. C. U. S. No. 147. The City Council of Augusta, appellant, *vs.* Harriet Cazenove Jones and Frank Cazenove Jones, administrators, with the will annexed, of the estate of Gazaway B. Lamar, deceased. Filed October 11, 1889.

149 U 8770

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1 UNITED STATES OF AMERICA, }
District of Rhode Island, } *sc.*:

At a circuit court of the United States for the first circuit, begun and holden at Providence, within and for the district of Rhode Island, on the 15th day of June, A. D. 1888, before Honorable Le Baron B. Colt, circuit judge.

TIMOTHY KELLY
vs.
CONTINENTAL STEAMBOAT COMPANY.

Declaration. Filed June 2, 1888.

Circuit Court of the United States for the District of Rhode Island, June Term, A. D. 1888.

PROVIDENCE, *sc.*:

Timothy Kelly, of Boston, in the Commonwealth of Massachusetts, and a citizen thereof, complains of the Continental Steamboat Company, a corporation legally created by the General Assembly of the State of Rhode Island and a citizen thereof, located and doing business in the city of Providence, in said State of Rhode Island, summoned by the United States marshal in an action of the case; for that the said defendant corporation, at Rocky Point, in said district,
2 on the 26th day of July, A. D. 1887, and long before that time, to wit, for the space of one year, had established and used and improved and kept to be opened and used a certain hotel at said Rocky Point, situated in the town of Warwick, in said district, for use by the public and for the usual purpose of a hotel and for hire, which said hotel and the platform surrounding the same the said defendant was then and there, during all that time aforesaid, bound and obliged to keep in a safe and suitable condition and repair for such purpose and use by all persons properly and rightfully upon and using the same; yet the said defendant, at Warwick aforesaid, on the 26th day of July, A. D. 1887, so careles-ly and negligently kept and managed the platform surrounding the said hotel and upon which the plaintiff was obliged to go to enter the said hotel that the same was then and there, during all said time, insecure, unsafe, and defective and out of *the* repair by reason of want of necessary support to the said platform; and the plaintiff, having occasion to pass along and upon the said platform so adjoining the said house or hotel as aforesaid and being lawfully and properly upon the same, as an excursionest, upon the defendant's invitation as a common carrier of passengers for hire, on said 26th day of July, A. D. 1887, and then and there, in the exercise of ordinary and due care and dil*l*igence and without any fault and neglect on his part, was precipitated violently to the ground a distance of, to wit, fifteen feet, by reason of the said platform giving way, and thereby injured

his spine, ruptured the urether or neck of his bladder, and
3 received lasting wounds upon his person, which caused acute and intense pain and suffering and great prostration of heart, and endangered his life, and from which he is still suffering, and from which he can never recover, and has thereby been subjected to great loss of time, to great expense for surgical aid and operations, and to great prostration of strength and spirits without any reasonable prospect of permanent relief—

To the plaintiff's damage thirty thousand dollars, as laid in his writ, dated the 11th day of February, A. D. 1888.

Wherefore he sues—

By his attorneys, COLLINS, BURKE & GRIFFIN & JOHN M. BRENNAN.

Defendant's Plea. Filed June 15th, 1888.

And the said defendant (by leave of court first had and obtained), by its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the premises above laid to its charge in manner and form as the said plaintiff hath above complained, and of this the said defendant puts itself upon the country.

By its attorneys, MINER & ROELKER.

And the plaintiff doth the like.

By his attorney, JOHN M. BRENNAN.

4 PROVIDENCE, *June* 13, 1888.

Permission is hereby given for defendant corporation to answer the within-entitled cause without motion.

JOHN M. BRENNAN,
Plaintiff's Attorney.

This cause was called for trial at the June term, 1888, of said court, to wit, on the 22nd day of October, 1888, before a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, returned their verdict thereon upon oath, and say that—

The jury find that the defendant is guilty in manner and form as in the plaintiff's declaration is charged and set forth, and assess damages for the plaintiff in the sum of ten thousand dollars.

BENJAMIN DROWN, *Foreman.*

And on the 10th day of January, A. D. 1889, the defendant corporation having theretofore presented *his* bill of exceptions to the court the same was filed and allowed, and is in the following words:

5 *Bill of Exceptions. Filed January 10th*, 1889.

This cause came on for trial on the 22nd day of October, 1888, the Hon. George M. Carpenter, United States district judge for said district, presiding, with a jury. The jury took a view of the premises where the occurrence took place, which are the subject of the action—

that is to say, the place or estate called Rocky Point, in this district. A full statement of all the testimony of the witnesses for both plaintiff and defendant, so far as the same relates to and is material for the purposes hereof, is hereunto annexed, marked "Exhibit A," and is hereby referred to and made part of this bill of exceptions.

After the evidence was closed at the said trial and before the judge presiding charged the jury therein the defendant presented the following request in writing or prayers for instructions to the jury, and requested the judge presiding to give them as instructions to the jury, to wit:

First. The plaintiff having declared that the piazza was attached to a hotel, he must prove it a hotel. There is no evidence in the case tending to prove that the building was a hotel, and there is evidence that it is not hotel. The jury should be instructed to find for the defendant.

Second. That if the jury find upon all the evidence in the case that this building to which the piazza was attached was not a hotel, they must find a verdict for the defendant.

6 And the judge presiding refused so to charge as requested, and denied both of the said requests and prayers for instructions.

Whereupon, and before the jury retired from the bar, after receiving the charge of the court, the defendant duly excepted to the refusal of the court to charge the said several requests and prayers for instructions, as above set forth, and said exceptions were duly noted by the court at the time of the making thereof.

This bill of exceptions was duly presented to the judge presiding at the trial, at the same term of the court at which said verdict was rendered, for his allowance, and, having been duly examined and found to be in accordance with the truth, is now allowed and signed, together with said "Exhibit A," as a part hereof, as of the 3rd day of November, 1888.

G. M. CARPENTER, *J.*

7 EXHIBIT "A."

MICHAEL H. NORTON sworn.

(By Mr. BURKE:)

Q. You dwell at Boston, Mr. Norton?

A. I do, sir.

Q. And your business is florist?

A. Yes, sir.

Q. Now, did you in the summer of '87 come to Providence and see anybody connected with the Continental Steamboat Company?

A. I did.

Q. Who did you see?

A. Mr. Buffum, the agent of the Continental Steamboat Company.

Q. What position does he occupy in that company? Do you know?

A. Agent, as I understood it.

Q. What did you see him for?
A. To make an arrangement for an excursion of our club.
Q. What club was it?
A. Florists' club of Boston.
Q. Did you make any arrangements with him?
A. We talked it over after visiting several other places and got his terms, and in regard to the grounds and what accommodations we should have.

8 Q. What grounds are you speaking of?
A. Rocky Point.
Q. Where we were yesterday?
A. Yes, sir.
Q. Now, what arrangements did you make?
A. The arrangements were merely verbal arrangements.
Q. What arrangements were they?
A. For our dinner, that we should have a headquarters in this building. He was to furnish a room for headquarters in this building, and provide dinner.
Q. He was to provide dinner? Was there anything said about where the dinner was to be given?
A. Yes, sir.
Q. What about the use of the grounds?
A. We were to have the use of the grounds, and there seemed to be other parties there the same day. The ball ground was to be used at a certain hour, other parties being there before us.
Q. Was there anything unusual happened after you arrived at Rocky Point? If so, state fully to the jury what it was.
A. After leaving the boat we proceeded up the hill to where our headquarters were set for us, I being one, and maybe one of the last to leave the boat, and we were going to use the quarters, and some of the same building was used by another organization who had headquarters there also, I think from Charlestown. We were assigned to a room at the further end of the building, and,

9 as far as I understand and remember, the parties went up there, and I went on the platform and around the building and came back again, looking as to how the arrangements were going on, and I heard a crashing and down came the platform.

Cross-examination:

Q. Who, Mr. Norton, made the arrangements as to the room?
A. Mr. Buffum.
Q. With whom?
A. In corresponding with our committee.
Q. Have you got that correspondence with you?
A. Yes, sir; I have got a copy of it.
Q. Do you know Mr. Walsh?
A. One of the committee?
Q. Yes.
A. Yes, sir.
Q. What is his name?
A. Patrick Walsh or Welsh.

Q. Now, what office did Mr. Welsh hold?

A. He was one of the committee. I was secretary of the club, and all papers came through my hands.

Q. You were present at some of the conversations, you say, which took place—the verbal conversations which took place about this contract.

A. Yes, sir.

10 Q. And, as I understand you to say, these verbal conversations took place outside of the written contracts. There were verbal talks about the contract outside of that, were there?

A. Yes, sir.

Q. Now, you wanted a room, didn't you?

A. Yes, sir.

Q. What do you want it for?

A. Headquarters.

Q. Now, in these conversations at some time between Mr. Buffum or Mason the agents of this company told you that they could furnish you with a room, but that they couldn't allow more than six or seven to go up to this room at a time?

A. No, sir; nothing of the kind. No particular number ever mentioned in my hearing.

Q. That you recollect?

A. No, sir.

Q. You say you saw at the time or after this accident happened one or two women in the room?

A. Yes; either one or two.

Q. Do you know where these women came from?

A. They were working about the place, as I understand—servants in the building.

Q. Did you not know that they came from upstairs in the building, where they lived?

11 A. I don't know where they came from, any more than seeing them going up and down.

Q. Did you see them coming down the stairs from upstairs?

A. I did; yes, sir.

Q. At any of these conversations which took place between you and the agents of this company about this contract, didn't you learn that there was a family lived upstairs?

A. No, sir.

Q. Did you know that the office of the company was in this building?

A. I did. I knew there was an office there, for I had conversation with him, Buffum, there.

Q. Now, in these conversations which you had, was it not stated in your presence by some of the committee that they wanted this room—a small room—for a committee room, and they wanted to put some refreshments in there?

A. Well, no, not exactly. We made an arrangement with the party that we were to take down our refreshments ourselves, and have a place where we could utilize them. That was how the conversation came up afterwards; that they were to furnish us this

room for our refreshments on condition that we should not sell anything—nothing to be sold on the grounds.

Q. Didn't your committee state that they wanted this room for these headquarters, and that they would keep it very quiet, and not have only a very few people in there at a time?

A. No, sir; we didn't understand that. In reality we
12 didn't know until a few days before what room was to be assigned us.

Q. I am talking about a few days before, in this conversation which took place, and wasn't it said to your committee, and didn't your committee say to the agent of this company, that you were to have this room for your headquarters—for your refreshments—nothing to be sold, but that there were to be but few people in there at a time?

A. No, sir; there was no liquor or anything said about.

Q. You don't recollect it?

A. No, sir.

Q. Did you go down there the night before?

A. No, sir; some of the committee did.

Q. Then there were three of the committee that went down there the night before to make arrangements?

A. No; they went down to fix up this room, and some of them took down the refreshments the night before to have it ready in the morning.

Q. And you were not one of those?

A. No, sir.

Q. So you don't know what took place at this time? Who was this committee that went down the night before?

A. I remember one was Mr. Coleman.

Q. Who else?

A. And I think the other party of two that he had with
13 him were not members of the committee, but his assistants that he had secured to assist him in cleaning up, &c.

Q. What did you go up to this headquarters for?

A. Well, they had them for headquarters, and some after travelling all the morning, I suppose, wanted some refreshments.

Q. What did they go to get?

A. Refreshments.

Q. What do you call refreshments?

A. All kinds of light liquors, wines, ginger ales, cigars, and milk. Some of the party drank milk.

Redirect examination (by BURKE):

Q. Mr. Miner asked you about a letter. Is that the letter that you mentioned?

A. Yes, sir.

(Mr. Burke reads letter of July 20th, '87, signed by Mr. Buffum.)

Q. Then across it is written: "Mr. Coleman will attend to putting away refreshments to-day, and any assistance you may give him

will oblige P. Walsh, for committee." Is that the Mr. Coleman that you mentioned?

A. Yes, sir.

14 TIMOTHY KELLY sworn:

Q. After you got out did you make any examination of the platform or place underneath to see what the cause of the accident was?

A. Not at that time, I didn't. I did after I had been into the hotel. They brought me into the hotel, and I guess there was a doctor that belonged to the other society.

Cross-examination:

Q. After this platform went down, where did you say you went—into some room?

A. Yes.

Q. Where was that room?

A. Upstairs in the building.

Q. In this same building?

A. Yes, sir.

Q. You went upstairs in this same building?

A. Yes. One or two of those men brought me where there was another man with a fractured leg.

Q. That was in the same building?

A. Yes, sir.

Q. How long did you remain in that building?

A. I didn't remain there at all much more than an hour on the whole ground.

15 Q. After you were hurt you went into this building?

A. Yes, sir.

Q. How long did you remain in that building? About how long, as near as you can come?

A. Perhaps 25 or 30 minutes. I am not positive.

Q. Now, before you went up from the boat to this building had you had any talk with anybody about these headquarters?

A. No, sir; not a word.

Q. Did any of these parties say anything to you about what way you went up there?

A. Not a word; not one word. We got out and walked direct to the building.

Q. And you went direct to the building because the rest of the crowd leaving the boat went there?

A. Yes, sir.

Q. You went with the crowd because the crowd went, you mean?

A. Yes, sir.

Q. Did you know after you got up there that there was refreshments there?

A. I supposed we were going to get our dinners.

Q. Did you know after you got there that there were refreshments there?

A. I know that I got a glass of brandy or something while

16 I was suffering. That is all the refreshments I saw. Of course,

I could see some. I think I saw the other men drinking something after the accident. I couldn't swear whether I got brandy or what.

THOMAS DAILEY sworn.

Cross-examination:

Q. You saw Kelly, you say, after the accident at that time—you took him up into a room?

A. Yes, sir.

Q. What room was that?

A. A room down in the hotel.

Q. Well, when you speak about down in the hotel, where do you mean?

A. Down at Rocky Point. Down where the accident happened.

Q. Was it in a room of this same house where it happened?

A. Yes, sir.

Q. You took him up into this room?

A. Yes, sir.

Q. How did you get up there?

A. Went in the other door and into the office and up to the room.

17 Q. On the back side?

A. Yes, sir.

Q. How long did Mr. Kelly stay there?

A. Well, to the best of my opinion, he stayed there about an hour, I think, until he went away. I think it was about an hour until the boat got ready to start. I don't know how long it might be. I guess it was about an hour.

Q. You were with him?

A. Yes, sir.

Q. And you are certain that he stayed there until the boat started?

A. Yes, sir; I am certain of that, certainly.

Q. You stayed with him?

A. Yes, sir.

Q. Did he go out of the room while you were there?

A. No, sir; not until he was helped out.

Q. Didn't go out of the room?

A. No, sir.

Q. Are you positive that he didn't go out of the room?

A. I went out of the room myself. He may have gone out to look for his glasses and hat.

Q. But you wasn't out for an hour?

A. No, sir.

Q. If he had gone out you might not have seen him?

18 A. I might not. I went out myself.

Q. I understood you to say that you went up into this room and took Kelly there?

A. Yes, sir; and left him.

Q. I understood you that you stayed there an hour?

A. No, sir; I didn't. I went out myself. I did what I could for him, and left him with Mr. Galvin and Mr. Otto.

Q. I asked you how long Kelly stayed there. I understood you to say that he stayed there about an hour. "I am certain he stayed until the boat started; I stayed with him." Was that what you said?

A. O, no; I didn't stay with him in the room that time. I came outside.

Q. I asked you how long you stayed with him in the room?

A. I stayed there about half an hour, I guess.

Q. Then you were a half an hour in the room with Kelly?

A. Yes, sir; I guess I was all of that.

Q. Did he go out of the room while you were in there that half an hour?

A. No, sir.

Q. How long after that did you go back to this room after you went out?

A. I came back and he was going down to the boat. That was all.

Q. Now, how long was that from the time you first went in?

19 A. Well, from the time I first went in until the boat started I guess was about an hour, to the best of my opinion.

Q. Then you took him and went up into this room with him?

A. Yes, sir; after the accident happened.

Q. You were with him, you think, more than a half an hour?

A. About a half an hour, I think.

Redirect (by Mr. BURKE):

Q. Have you seen him in any place to work prior to this accident, working himself?

A. No, sir.

Q. Let me bring your attention to one particular. Do you remember Kelly's doing any work opposite the stable where you are employed the summer before last? Well, never mind. I will ask you what you meant in your testimony on cross-examination by "hotel;" is it the building where the accident happened?

A. Yes, sir.

Q. That is the building the platform of which fell?

A. Yes, sir.

20 A. LIVINGSTON MASON sworn.

(By Mr. ROELKER:)

Q. Mr. Mason, you are the treasurer, I believe, of the defendant company?

A. Yes, sir.

Q. And also its general manager?

A. Yes, sir.

Q. And have been for some years past?

A. Yes, sir; some four years past.

Q. Now, you recollect the occasion of the breaking down of the piazza?

A. Perfectly well.
Q. At Rocky Point. And where were you at that time?
A. I was down in what was called the shore dining-hall.
Q. You were there at Rocky Point that day?
A. There at Rocky Point; yes.
Q. Had you been there previous to that day?
A. At Rocky Point?
Q. Yes.
A. O, yes.
Q. Were you there the day before?
A. Yes.
Q. Now, you recollect about this house or cottage where this accident occurred. Will you please tell the jury what that
21 building was used for at that time and had been as long as you knew it?
A. Well, the building at that time was used for an office building.
Q. Whose office?
A. The steamboat company and Rocky Point excursion grounds, and it had been used so in the course of a great many years. From the time I had connection with the place it was used as an office of the company.
Q. Where was the office then?
A. It was in the front part of the building. It took in a number of rooms there.
Q. And what other purpose was it used for?
A. And we also had there some committee-rooms, which we sometimes allowed committees to use, and it was used as the residence of the man who had charge of the place in winter, and also lived there summers, and was used for our help to sleep in.
Q. What was this man's name?
A. John Branegan.
Q. Has he a family?
A. He has a family—a number of children and a wife.
Q. And he and his family live upstairs, together with the help who sleep there?
A. Yes.
Q. Now, was that house at that time or had it at any time
22 previous been used as a hotel in any way?
A. No; not any time that I have had any connection with it at all.
Q. The preliminary arrangements for this excursion were made by you or Mr. Buffum?
A. Made by Mr. Buffum, in the first place, and afterwards I saw the committee and arranged the details.
Q. What was the first interview that you had with any one on behalf of these excursionists?
A. It was on the evening of the 25th of July. Three people came down there. I believe two of them were outside men, and one was the committee of arrangements, Mr. Walsh.
Q. Mr. Welsh and two others?
A. And two others.

Q. Did they bring anything with them?

A. Yes; they brought some liquid refreshments.

Q. Please state what they were.

A. It was rum and gin and whiskey, as I understand it, and beer, and some apollinaris water, and whether there was any soda or not I am not certain. I think there was.

Q. How much was there of this stuff?

A. A two-horse load.

Q. What conversation, if any, took place between you and them on that day or the next morning?

23 A. At the time the stuff arrived I objected to its being on the grounds at all. I said it was against our rules, and we don't have anything of the kind and don't allow anything of the kind to be on the grounds by any society of any name or nature. I told him he would have to take it off, at first, and after that they said they wanted it for their own people, and I said that if they took it up in a room there and would make a certain agreement with me I would let them have it under those conditions, and they agreed to the things which I said. That agreement was that they should allow only five or six people up there at a time; that it was a committee-room and that the society shouldn't go there at all as a society. As they were their guests, if they chose to have a few go up there at a time, I said, five or six, I was perfectly willing, as the stuff had arrived there. As it was a new society, I didn't care to lose their good will, and I didn't send the stuff back on the boat, as I had done at previous times to other societies. I was speaking to Mr. Welsh, of course, who seemed to be the head man of the committee. The other two men I didn't know anything about at all.

Q. Mr. Welsh came down there. Did he represent to you at any time anything in reference to his power about the matter?

A. Represented to me as being the head of the committee, that was all—that he had powers; that was all there was about it.

24 Q. And you made this agreement with him?

A. I made an agreement with him to that effect.

Q. Now, with reference to the room, how large a room was it where this stuff was put?

A. About 9 by 13, I should judge.

Q. And what had that room been used for prior to this time?

A. Used as a store-room for things we didn't care to use, old boxes and barrels, and, I think, some old clothes. They belonged to Mr. Branegan, I think—the soiled clothes of his family.

Q. These committee-rooms, where were they?

A. On the other side of the building, in front.

Q. On the same floor?

A. Yes.

Q. How are they used there?

A. They had been used as committee-rooms for the committee of societies to go and count their tickets and for such other business as they would have—settlements of their own accounts, settlement of accounts with us, or any other business that they might have for the committee.

Q. What had you done that year in reference to the piazza, if anything, and what inspection had been made?

A. I have a carpenter down there, or two or three carpenters ordinarily this year. I think there *are* was two, but only one that I think of now. His instructions were to see that all the
25 buildings (int.)——

CARPENTER, *J.*: That is not proper.

Q. How was this piazza constructed?

A. It was constructed of rough timbers, and on the outside it was cased over with pine boards.

Q. What was the appearance of the piazza on the exterior, if you know, prior to the accident?

A. It was perfectly sound in every way, to all appearances.

Q. Had you yourself made any use of the piazza?

A. Yes, sir; I lived in the house myself for one season, and used the piazza every day, of course.

Q. What use was made of the piazza by the other persons connected with the company, if you know?

A. They were obliged to use it to get out of their apartments. Of course, it was used every day by the people who lived in the house.

Q. Now, you have stated that it was made of rough stuff.

A. Unplaned stuff, I meant by that.

Q. Was there any covering over it?

A. It was covered with planed boards, of course, to make a handsome finish to it, and painted.

Q. Now, Mr. Mason, on the day of the accident, when it occurred where were you?

A. I was down at the shore dining-hall, standing at the doorway.

26 Q. Is the building in the same situation and condition in which we saw it there the other day?

A. The same place, just exactly.

Q. What was you doing then?

A. Waiting for the society to come down there for their dinner.

Q. You didn't see the accident yourself, I believe?

A. No, sir; I was on the way to notify them that dinner was ready when the accident occurred.

Q. You were on your way up to this building?

A. Yes; I was behind the rock at the time, and, of course, I didn't see it, as it happened while I was behind this rock.

Q. What is the position of this dining-hall with reference to the water and that part of the river?

A. It stands on the water and runs along the shore.

Q. Is there anything to obstruct the sight?

A. Nothing at all. It is in plain sight right from the boats and from the water. You land at the place; can see the tables.

Q. Is the interior of the dining-hall, where the tables are, visible or not?

A. Entirely open. You can see the tables, plates, and everything; no obstruction at all.

27 Cross-examination (by Mr. BRENNAN):

Q. How long have you been connected with the Continental Steamboat Company?

A. Five years, I believe, as one of the officers.

Q. *In* what office did you first hold?

A. I was first assistant treasurer and general manager, and afterwards treasurer and general manager in full. I don't recollect whether appointed in 1884 or 1885.

Q. There was a hotel opposite the landing for some years?

A. Not since I have been connected with it.

Q. Then, by misfortune, it burned down before you were connected with it?

A. Yes, sir; it burned down.

Q. When was that?

A. In 1883.

Q. So that there has been no building used as a hotel there since, has there?

A. There has been a place used as a boarding-house since.

Q. That don't belong to the grounds proper?

A. No, sir; it is off one side.

Q. That is the old Sprague mansion?

A. Yes, sir.

28 Q. And used as a boarding-house?

A. Yes, sir.

Q. So that before you were connected with this company officially this large hotel was destroyed by fire?

A. Yes.

Q. And that, you think, was in '83?

A. March, '83.

Q. These grounds you advertise quite extensively, don't you?

A. Quite so.

Q. Very extensively?

A. That is a matter of opinion entirely.

Q. You have a lithograph here? That is it?

A. That is it.

Q. That is supposed to represent the grounds?

A. Yes, sir.

Q. What is that building?

A. That is the office.

Q. And you intend by that that the public have the use of all these buildings, I take it?

A. Not that building at all.

Q. All the buildings you advertise are for the benefit of the public?

A. I don't advertise the office building for the use of the public.

Q. What do you call the office building?

29 A. That is the office building.

Q. Why don't you advertise "all these buildings are to be used except the ones that we strike out?"

A. I don't write anything about them.

Q. Now, Mr. Mason, will you be kind enough to tell the jury, outside that building, where there is any building that can be used by the public for hotel purposes on those grounds?

A. There is no place that can be used as a general hotel on the place at all.

Q. There is no place that can be used for hotel purposes on the grounds except that building? Outside that building, where is there any building on the grounds that can be used for hotel purposes?

A. Where there are any rooms on the grounds?

Q. Yes; any private rooms.

A. Our help sleep (int.)——

Q. I am talking about the public.

A. The public can sleep nowhere on the grounds.

Q. I am not talking about sleeping, but for hotel purposes.

A. There is no place on the grounds for hotel purposes, of any name or nature.

Q. Not even this building?

A. Not even that building.

Q. How many rooms are there in that building?

A. If you want me to calculate it exactly—I can tell you very close—I think about 16 to 18 rooms.

30 Q. Who is John Brannegan?

A. He is the man who has charge of the grounds in winter and does the teaming in summer.

Q. Does the teaming in summer?

A. Yes; has charge of the wharf and the teaming business.

Q. And has charge of the grounds in winter?

A. Yes, sir.

Q. And you let John Brannegan occupy a luxurious suite of 18 rooms in summer?

A. No; in winter.

Q. What part of the house does Brannegan occupy?

A. He occupies the front part of the house through the house.

Q. He has the front part of the house for a parlor?

A. Yes.

Q. A small parlor?

A. A large parlor.

Q. What other rooms does he have?

A. Two or three rooms outside of that, and a dining-room downstairs and a kitchen.

Q. And three rooms in the roof—next to the roof?

A. The rooms in the roof are occupied by the other help—the lady help.

Q. How many rooms have you there for the public?

31 A. No rooms at all.

Q. How many unoccupied rooms, then?

A. Two.

Q. Is that all?

A. That is, the two rooms I speak of and a store-room that hav- already been spoken of.

Q. How many rooms, on the 26th of July, '87, were occupied by John Brannegan?

A. He could tell you that better than I can, of course. I think it was four or five rooms.

Q. You think he had four or five rooms?

A. I think so.

Q. Rent free?

A. Rent free.

Q. And how many did the servants have?

A. They had the balance of the rooms.

Q. So that John Brannegan, the man who drives a team, had a large parlor and a dining-room for himself and a couple of bedrooms?

A. I can explain his situation a little better. There are three superintendents, and he is one of the superintendents, and that includes the wharf and the teaming.

Q. That don't raise his situation any, does it?

A. You can call him anything you please.

Q. Smells just as sweet?

32 A. The rose by any other name would smell a- sweet, I believe.

Q. He was nothing but a teamer in summer?

A. We think he was quite a man.

Q. But he was only a teamer in the summer?

A. He had charge of the wharf as well.

Q. He had four or five rooms in summer?

A. He had four or five rooms out of the 18.

Q. How many did the servants have?

A. They had all the third story upstairs, and Mr. Marchant, a superintendent there, had two rooms with his family.

Q. How many girls were there?

A. I couldn't tell you how many girls there were.

Q. Girls that take care of the hotel?

A. No; girls that were around in the stands—in the pavilion and around the grounds.

Q. About how many should you think?

A. It is pretty hard to tell. We have a great many.

Q. How many rooms did you have for the public?

A. Had no rooms.

Q. What did you let them to the public for?

A. Don't let them to the public.

Q. Not even in this case?

A. No.

Q. Now, I wish you would tell the jury, Mr. Mason, why

33 you didn't want but six or seven people in the house at a time.

A. On account of our office being there and on account of the rooms where our people go. I didn't care to have a large crowd up there at all. We never allow it under any circumstances.

Q. Why did you limit the crowd to six or seven?

A. So as to have no disturbance.

Q. Why did you say in the letter that it could be headquarters for the club and also for the committee?

A. I didn't write that letter.

Q. But it was written by authority of the company.

A. It was written by Mr. Buffum, and his idea was probably the same as mine. It was written by Buffum, and as a committee-room it was all right.

Q. How was it headquarters for the men?

A. A room 13 by 9 would hardly be headquarters for 250 people.

Q. What room did the Odd Fellows occupy that day in the house?

A. They had a small room right next to the office.

Q. For what purpose?

A. For a committee-room.

Q. And it was used by the Odd Fellows all day?

A. Yes.

34 Q. Going in and out there all day?

A. Yes, by their committee; and probably some of the Odd Fellows went in after the accident happened. I didn't keep much track of it.

Q. But it was used by the Odd Fellows all day?

A. Yes.

Q. And they were going in and out all day under your observation?

A. Yes, in small numbers.

Q. And you were standing at the boat when the florists arrived from Boston?

A. I don't remember where I stood then.

Q. You say you saw them go into this hotel as you were standing at the door of the dining-room?

A. No, I don't say anything about that.

Q. How long did you stand at the door of the dining-room?

A. I presume I was there shortly before the boat arrived, when I saw the boat.

Q. You said you stood there when the florists came to dinner?

A. I stood there waiting for the florists to come to dinner.

Q. Did you know where they were?

A. We expected them on the boat.

Q. You saw them arrive on the boat?

A. Certainly.

Q. Where did you see them go to after seeing them coming off of the boat?

A. I didn't see them at the time they came off of the boat. It is difficult for me to recollect where I saw them going. I was told that they were at the office.

35 Q. You were at the dining-room?

A. Yes, sir.

Q. Did you see them go to this building?

A. I don't think I did see them.

Q. Did anybody inform you that they had gone there?
A. Somebody informed me.
Q. Who was it?
A. I don't know.
Q. Did you inquire about it?
A. In what way?
Q. Did you inquire if it was a fact that they were all up there?
A. Yes, sir; I did find it a fact.
Q. So that you knew that they were all there?
A. I did.
Q. Did you send anybody to tell them to come away?
A. I went myself.
Q. What for?
A. To tell them to come to dinner, and it was against our agreement for them to go up there.
Q. And then you went to tell them that it was against the agreement?
A. I went to see Mr. Welsh to tell him, and I felt indignant.
Q. Did you tell them?
36 A. No, I didn't tell them. I found the piazza down when I arrived there.
Q. When did you find out that they were all up there?
A. I was told immediately after the boat arrived.
Q. And how long a time elapsed before you went up to notify them to come to dinner?
A. From the time they arrived, or from the time the boat arrived?
Q. From the time they arrived.
A. It was inside of ten minutes, I should say.
Q. The walk isn't long from the wharf to the house?
A. Not a very long walk.
Q. So that you knew that they were there for about ten minutes?
A. No, I don't say that. As soon as I heard they were there I went up to ask them to come down to dinner, as I couldn't hold the places for them any longer.
Q. Did you see the Odd Fellows there?
A. At the time I arrived there the piazza was down.
Q. Did you see any Odd Fellows in there about the building?
A. Yes, sir.
Q. How many did you see?
A. Take it at that time, it was pretty hard to tell their number, as there were a great many of all kinds there. There were a
37 great many people, and I had a policeman there to keep them out. I put some policemen there to keep people from going into the office building.
Q. When?
A. After the accident.
Q. Did you have any policeman or anybody to keep them out before the accident?
A. No; I didn't expect them there.
Q. But there was a lingering suspicion that there was something the matter with it when you were limiting them to seven.

A. No suspicion in my mind that there was any trouble with the platform in any way.

Q. Why were you so particular about the seven?

A. Because we don't allow crowds up there.

Q. Why didn't you put a man there?

A. I supposed they would follow their agreement.

Q. You have been connected with this thing since '83?

A. Yes, sir.

Q. And you have excursions there every day?

A. Pretty nearly every day in summer.

Q. Did you ever know a time when the building wasn't thrown open for people?

A. I hav'n't known it when it was open to the public at any time.

38 Q. And you have been there through that summer prior to July 26th, when there were hundreds of people on that platform and in that house?

A. Never; not to my knowledge.

Q. I will call your attention to the fact of the excursion of the travelling salesmen of Providence.

A. Yes.

Q. That was early in July. Were you not in there when there was about 200 in there enjoying refreshments?

A. What year was that?

Q. In the year '87, early in July, the same summer—not seven, but hundreds of men in there and carousing.

A. There shouldn't have been.

Q. Were you not there?

A. I don't remember the society you speak of.

Q. Any society that you remember, having a hand in it yourself?

A. I don't remember any large society being up around in that building.

Q. In July, '87, what was the largest number of men that you saw on that platform and inside of the house?

A. I should think the largest number was on the day that these people were there. I should think so.

Q. You don't recollect that day in July that they let the whole Democratic party loose on you there, do you?

39 A. I recollect the Democratic party coming. I don't recollect whether it was in '87 or not.

Q. How many did you see on the platform at that time?

A. I don't recollect to have seen any large number of people.

Q. Do you think this was the largest number of people that were there at any time?

A. I think so.

Q. How many Odd Fellows were there on that day?

A. The Odd Fellows, I don't think, was a large party; but, of course, I can't tell without referring to the minutes.

Q. The florists were limited to what?

A. 274 people.

Q. And that was the largest party that you had all that year?
A. On the grounds?
Q. Certainly.
A. No, that is not any kind of a party at all.
Q. Was not the most of the florists in and about this building at the time the rest of the crowd came?
A. If I tell you exactly how things were—after the piazza fell there was a great many people came into the building and I had to clear them out. Th-re was a great many people in and about the building after the accident.
Q. You invite everybody to these grounds, to come if they have any money to spend, and are glad to see them?
40 A. Yes, sir.
Q. And this building is thrown open down-stairs?
A. The office is thrown open.
Q. But the back door is open and the front door is open?
A. The back door is generally closed, but on a warm day it may be open.
Q. Closed in December?
A. Yes, sir.
Q. And the public are free to go up and down the piazza?
A. The public are not free to go up and down.
Q. Did you ever have a man or woman there to stop them?
A. Yes, sir; I have had men there to stop them if any large crowd came up there. As a general thing, this was entirely private, and they were not expected to be there.
Q. Take the 26th day of July, that year. There was nobody to stop anybody from going up there at that time, was there?
A. Nobody, unless Mr. Welsh stopped them, and he didn't, I think.
Q. How many Odd Fellows were on this piazza at the time it fell?
A. I don't know.
Q. Did you have anybody there to stop them from going on to it?
A. I don't think we did; no, sir.
Q. You knew they were going on it?
41 A. No, sir; I didn't know it.
Q. You knew they were on the piazza?
A. Not until I was told, when I was down at the clam-house.
Q. Is there any building other than this that a gentleman can bring a lady to in case it rains or the weather becomes inclement?
A. There are lots of buildings. The pavilion and menagerie (int.)——
Q. The pavilion is all open?
A. Yes, sir; curtained to keep out the weather.
Q. What other buildings?
A. A large dance-hall that they can go into.
Q. That is open?
A. No, that is not open; and there is a bowling-alley also.
Q. But have you got a room there that a gentleman can bring a lady to in case of sickness or the inclemency of the weather?
A. Not since the hotel is burned down.

Q. This is the only building that you have since the hotel was burned down that a gentleman can bring his wife and children to?

A. He couldn't bring his wife and children there unless he came into my private office.

Q. You wouldn't let him have those private rooms?

A. Not if they were occupied by committees.

42 Q. They might be used before the 26th of July?

A. They hadn't been used for that purpose.

Q. Nobody tried to?

A. Yes; they tried to lots of times.

Q. What do you do when a gentleman's family or wife gets sick?

A. It is not generally a gentleman and his wife comes. We don't do that kind of business. If they are real sick we can, perhaps, take care of them.

Q. I can imagine the disgust that you had when you found out that this was rum and whiskey; but how did you find out what it was?

A. I was told. It came down the day before.

Q. How did you find out that it was rum and whiskey and gin?

A. I was told so. I asked Mr. Welsh what it was. I was also telephoned down from Providence that there would be three jugs.

Q. That was unusual for Rocky Point?

A. To bring it themselves.

Q. You swear that Welsh was there?

A. Yes, sir.

Q. And it took two horses and a wagon to carry it up to this house?

A. Yes, sir.

Q. Which you say isn't used for hotel purposes?

A. Yes, sir.

Q. And you thought that seven men could drink that up?

A. No.

43 Q. You were going to let them in, seven at a time?

A. I told Mr. Welsh that he had more stuff on the grounds than we would have for 2,000 people. Those were the words that I told Mr. Welsh at the time that I objected to its being there.

Q. I understood Mr. Miner to say that you objected to its being on the grounds?

A. Yes, sir.

Q. Simply that they brought it on the grounds. You didn't sell anything there?

A. Let me see. This was in '87. When did the prohibition law start in?

Q. That wouldn't affect it at all; in fact, it didn't.

A. I know after the prohibition law started in we sold nothing. I told these parties that it was against our laws as well.

Q. Does the company use this long piazza for its own use alone?

A. It is used almost entirely by the company, and, of course, committees and their friends, if they have guests or prominent men or anything of that kind. We are perfectly willing that a limited number should go on the piazza provided no disturbance takes place.

Q. And this is used by committees and their friends, and everything that is distinguished can go on there?

A. You can put that as you choose.

44 BENJAMIN BUFFUM sworn.

(By Mr. ROELKER:)

Q. Mr. Buffum, you are one of the officers of this company?

A. Yes, sir.

Q. What office do you hold?

A. I am passenger agent.

Q. You held this same office at the time this florists' excursion came down?

A. I did.

Q. Will you please state what the arrangements were that were made between you and this club of florists through their committee.

A. Well, the arrangements about the dinner—they were to have a special dinner, and the bill of fare I don't remember. The dinner was to be at one o'clock, if I remember right. That is according to the letter anyway, unless it was changed afterwards.

Q. What, if anything, was said about this headquarters?

A. They asked if they could have a room for the committee. I told them they could, and they asked if they could have any refreshments there. I told them they could in very limited quantities, where the committee could bring any invited guests to entertain them.

45 Q. Was there anything else said about that at that time?

A. Something was said about the quantity, about three jugs, but I don't remember what was to be in them; but the number of three jugs was particularly specified as the quantity which they were to take down with themselves.

Q. Now, you have been acquainted with these grounds for how many years, sir?

A. All of fifteen.

Q. And you know this building where the accident happened?

A. Yes.

Q. Will you please state to the jury whether that building has ever been used as a hotel or not, and whether it was so used at the time of the accident?

A. It never has since the hotel burned down—the other hotel—and I think before that it was not. I am not sure.

Q. Those hotels were burned down some years before this accident?

A. Burned down in March, '83.

Q. What was this building used for in '87?

A. It was used for the help—everything, I think, above the first floor. The lower floor was used for the office, and I think by special contract that committees were allowed to use the rooms. It might have been a store-room; I don't know.

Q. You say there was also a store-room there?

A. That I don't know. I say there might have been.

46 Q. Your duties more particularly took you up here at that time?

A. Yes, sir.

Cross-examination (by Mr. BRENNAN):

Q. You have been connected with this company how long?

A. I have been connected as an officer of the company about four years.

Q. You recollect when this hotel all of a sudden took fire, don't you?

A. Yes.

Q. When was this hotel that we are talking of built?

A. There isn't any now.

Q. What you have got pictured out as a hotel?

A. I only see the mansion house.

Q. That arrangement with the piazza around it, when was that built?

A. That is the office. That was built before I knew. I don't remember how long it has been there.

Q. About how long?

A. I couldn't say.

Q. It has been there over three years?

A. I have heard that it was moved from down by the water in '72.

47 Q. And when was it fitted up with these rooms, do you know, and had a piazza put around it?

A. It had them all the time, I suppose.

Q. You recollect when this piazza was put around this house?

A. No; I don't.

Q. When the hotel proper was there—I mean the large building that was destroyed by fire—your office was in that building, wasn't it?

A. I don't remember where the office was. I think it was in the main building at the time. I think so.

Q. And after the fire you moved your office up to this building, did you?

A. Yes.

Q. And you occupied one room as an office?

A. I don't know how many they had. Two or three, I think.

Q. Two or three offices now?

A. I think so.

Q. The lower floor wasn't occupied by any person in the house, was it, for sleeping-rooms?

A. When?

Q. After '83?

A. I don't remember that it was.

48 JOHN B. BRANNEGAN sworn.

(By Mr. ROELKER:)

Q. Are you employed by the Continental Steamboat Company?

A. Yes, sir.

Q. And were at the time of this accident?
A. Yes, sir.
Q. What is your business for the company?
A. I have charge of the place after the excursion season is over, and I have charge of the teaming and charge of the dock.
Q. Where did you live at that time?
A. I lived in Rock Cottage.
Q. That is this place where the accident occur-ed?
A. Yes, sir.
Q. Whereabouts did you live in the house?
A. I lived in the second story.
Q. What else was the building used for at that time?
A. Well, Herbert Marchant and his wife and his mother occupied two rooms on the same floor with me and I occupied the rest.
Q. Was he employed by the company then?
A. Yes, sir.
Q. Please repeat that about Mr. Marchant.
49 A. Mr. Marchant occupied two rooms and his mother another and I occupied the others.
Q. What was there on the ground floor?
A. Two offices, two committee-rooms, and this store-room that I had for storing my things in that I had to keep house with.
Q. Now, the afternoon before the accident, do you recollect these men appearing there?
A. Yes, sir; I do.
Q. What was done and said there between them and Mr. Mason, if you know?
A. Mr. Mason showed them a room that they generally let the committee have, and they said that they wanted two rooms, and Mr. Mason said that one room was all any committee had, and they thought that room was rather small and they looked at this store-room of mine and concluded to take that.
Q. What did you do then about clearing it out?
A. I had a barrel of Haxall and a barrel of St. Louis and a wash barrel and wringing machine in there, and I cleared them out and put them down cellar.
Q. Was there anything came there for these people that afternoon?
A. Yes, sir; there was.
Q. Were you present at any conversation between these men and Mr. Mason about the use of that room?
A. Yes, sir; I was present during the whole of the conversation.
50 Q. What was said?
A. They said that that room wouldn't be large enough and they wanted more facilities, and Mr. Mason said that they couldn't have but one room. He said it was our office building and a private house, and we don't want any noise about here; and he said, "If you have it, we should want it to be kept very quiet around here, so as not to interfere with the rest part of the house;"

and they said that they would see that there was no crowd around there, as there wouldn't be but a very few in there at a time.

Q. What was that remerk?

A. They said they wouldn't bring in but a very few at a time—five or six at a time—and that they wouldn't make any noise or disturbance.

Q. Now, to come to the morning of the accident, just before the boat arrived, what did you do?

A. I had just got out from dinner, just before the boat came. As a general thing, when the boats are coming in I go down to see that my men are all right to catch the lines, and sometimes, when there is a big crowd, I help them out with the tickets, and I was there. When they went through they all went through but three, and they stood there settling up about the tickets.

Q. You mean all the rest of this party went through?

51 A. Yes, sir.

Q. Do you know anything about any one of these men coming down there that came the night before?

A. Yes, sir; one of the men came down. They wanted me to get them something to make a shelf to put their bottles and tumblers, &c., on, and I went to get a board out of the carpenters' shop and fit it up, and they concluded not to use it. I came down to the gate and one of these men came with me.

Q. Do you know what he did with reference to these men?

A. No, I don't. I know they all went up there.

Q. Leaving only these three men and yourself on the dock?

A. Yes, sir; and the ticket-taker.

Q. And all the rest of them went up there?

A. Yes, sir; and I saw this large crowd on the piazza there and, as my family were living there, I thought there was a row or something and I went through, and as I was going through where they take the tickets the piazza went down.

Q. Then you went up there?

A. Yes, sir.

Q. How many men were there on that piazza at that time?

A. I should judge from the looks of the crowd that there were from 125 to 150 men at the time.

Q. On the piazza?

A. Yes, sir; all around the door, rushing to get in.

52 Q. Mr. Brannegan, have you looked at this piazza before the accident?

A. No, sir; not more than I would examine any other part of the house.

Q. Did you ever notice anything that was out of order about it?

A. No, sir; I didn't.

Q. What use were you accustomed to make of this piazza?

A. It was my home. That is where I lived, and that was the door I used to go in and out of with my family.

Q. You had a family living there?

A. Yes, sir.

Q. And nobody else used the building?

A. In the summer time the help have slept up there—the girls used it, and that is all.

Q. Something was said about the steps at the north end. Where did these people go up onto the piazza?

A. By the north steps.

Q. Those steps at the right-hand side facing the building?

A. Yes, sir.

Q. Somebody said that those steps were not there at that time.

A. Yes, sir; they were before I went there, and they are there now.

53 Cross-examination (by Mr. BRENNAN):

Q. How long have you worked for the Continental Company?

A. I went in '84 to work for them on the dock at the city.

Q. And you are a married man?

A. Yes, sir.

Q. How much of a family have you?

A. Six children and a wife.

Q. And you all live at Rocky Point?

A. Five of my children live there with me and my wife.

Q. Small children, are they?

A. The smallest of them is 8 years old, and from that up to 17.

Q. Now, how many rooms do you occupy in this building?

A. Five.

Q. What are they?

A. Four sleeping-rooms and this sitting-room.

Q. Where are the four sleeping-rooms?

A. The front room is up over the office, on the south end of the building.

Q. Where are the four sleeping-rooms?

A. They are on the second floor, adjoining the sitting-room.

Q. Second floor from the piazza?

A. No, sir; the first floor from the piazza, in the second story.

Q. You have four sleeping-rooms there?

A. Yes, sir.

54 Q. That you occupy?

A. Yes.

Q. How?

A. To sleep in.

Q. You and your wife in one?

A. Yes.

Q. And you distribute the five children how?

A. I have one girl that has a room by herself and four boys have a room apiece. Two of them have a bed apiece in a room. Two occupy one room and two the other.

Q. You and your wife occupy one?

A. Yes, sir.

Q. And then you have three left?

A. Yes, sir; and the girl sleeps in one and two boys occupy one room and two another.

Q. What do the boys do, work there?
A. One of them did work there.
Q. Where did these servant girls sleep?
A. There was no servant girls. They are waiters; they wait on the table.
Q. Who were these ladies that occupy these rooms?
A. Ladies that sold candies and ice-cream.
Q. How many of them were there?
A. I couldn't tell you that.
55 Q. About how many?
A. I should think there was probably seven or eight of them.
Q. And how many rooms did they occupy in the house?
A. And then there was — women that had charge.
Q. How many of these girls?
A. I had no occasion to go up to their rooms.
Q. But you had charge of this house?
A. Each lady took charge of her own room.
Q. You had general charge of the house?
A. Yes, sir.
Q. How many rooms did they occupy?
A. I couldn't tell you that. They occupied them to suit themselves.
Q. How many rooms did the woman occupy?
A. One.
Q. Who was she?
A. The woman that had charge of the laundry.
Q. Where were these girls that had charge of the soda water?
A. On the same floor as me.
Q. And where was the lady?
A. On the same floor.
Q. How many rooms did you have unoccupied on the first floor?
A. Only the front room, and that was occupied every even-
56 ing by me and my family.
Q. And that was used by the public during the day?
A. No, sir.
Q. Didn't you ever see a crowd in there?
A. I have seen the committees.
Q. You have seen the committees in there, haven't you?
A. No, sir.
Q. Never saw your sitting-room occupied?
—. No, sir.
Q. Never saw guests in there?
A. No, sir; I didn't.
—. Have you seen any room on that floor occupied by guests?
A. No, sir.
Q. How long have you been there?
A. Two years.
Q. Two summers?
A. Yes, sir.

Q. You haven't been there since '84?
A. No, sir; I told you I was at work on the dock here.
Q. You got down her- about the time this accident occurred?
A. No, sir; I got down there the October before.
Q. And no room on the second floor has been occupied by guests since you have been there?
A. No, sir.
57 Q. Are you around the house during the day?
A. I come pretty near being around there.
Q. How often?
A. Perhaps 15 or 20 times; may be more.
Q. Where was the Odd Fellows' room on this day in question?
A. It led out of the office.
Q. How many rooms are on the first floor?
A. There are six.
Q. Six rooms on the first floor?
A. Yes, sir.
Q. And two occupied by the officers?
A. Yes, sir.
Q. And one room you had a barrel of flour in before a man could afford to buy one?
A. No; I could afford to buy one before I ever knew you.
Q. And you cleaned the rubbish out of this room?
A. Yes.
—. For these people?
A. Yes, sir.
Q. What room did the Odd Fellows have?
A. The room that led out of the office, on the west side of the building.
Q. Who had two rooms still left on that floor?
A. My kitchen and dining-room.
Q. But we have got through with your five rooms upstairs.
58 A. But I have rooms down-stairs where I do my cooking.
Q. So you have seven rooms in the house?
A. I have all the room I want when it is not in use. I had a kitchen and dining-room and store-room.
Q. Down-stairs?
A. Yes, sir.
Q. So that you have eight rooms altogether?
A. Yes, sir.
Q. That you were using for yourself?
A. Yes, sir; but I wasn't using them all at that time.
Q. Who used to eat in this dining-room?
A. My family.
Q. Anybody else?
A. No, sir.
Q. Where did these girls eat?
A. Down in the kitchen.
Q. Where was that?
A. The help's kitchen, down under the clam-house.

Q. But you didn't eat there?
A. I did after the excursion season.
—. I am talking about the excursion season.
A. I ate in the girls' kitchen after the season opened.
Q. You were eating in the girls' kitchen?
A. Yes, sir.
Q. Under the clam-house?
59 A. Yes, sir.
Q. So that this room wasn't used that we are talking about?
A. Yes, sir; it was used for my goods.
Q. The kitchen?
A. No.
Q. Then you were not using the dining-room, of course?
A. No.
Q. So that those two rooms were open for the committee?
A. The committee could use one of those rooms.
Q. The guests?
A. I don't know anything about the guests.
Q. Did you ever see a committee travel alone? Don't they generally have a pretty good crowd?
A. They have a pretty good crowd there; not much.
Q. They generally have their guests, don't they, as a matter of fact?
A. I don't see how you are going to get many into one of those small rooms.
Q. But you have seen a good many there?
A. No, sir; I haven't.
Q. What is the largest number that you have seen about there?
A. When the florists and gard-ners were there.
Q. The largest number in the house?
A. Yes, sir.
60 Q. You were not around there when the Travelling Salesmen had their picnic there that summer?
A. That was not in my time.
Q. You wouldn't have recollected that?
A. I would if they had come there.
Q. Do you recollect any other excursion that summer that had a room in that house?
A. Yes, sir.
Q. Who were they?
A. The Alfredians had one in there.
Q. Do you recollect the Forresters, this summer, having the use of the house?
A. The use of one room.
Q. How many were in there?
A. I couldn't tell you that.
Q. About three hundred?
A. No, sir; I don't know where you are going to put them, except on the piazza.
Q. Did you see them on the piazza?
A. No, sir; that was not allowed there.

Q. Are you not shut out from the lower part of that house in summer altogether, and isn't the lower part of that house thrown open to the public?

A. No, sir.

61 Q. Are you allowed to use a single room in the summer?

A. I have a store-room.

Q. Where you had the flour?

A. And access to the water-closet.

Q. Wasn't the flour put in the year before?

A. No, sir; when I broke up housekeeping.

Q. But you didn't need flour and pork if you were going to eat at Mason's expense in the clam-house.

A. I would want it to eat at my own expense.

Q. A lot of flour and a lot of pork?

A. Yes, sir.

Q. And you were not going to use them until the following fall?

A. No, sir.

Q. And yet it took a whole floor to keep them on—on the lower floor of a hotel?

A. I had got to keep them somewhere.

Q. Wasn't there a cellar?

A. Not such as I would want to put floor and pork into.

Q. Why didn't you put them upstairs in your own rooms?

A. Why wouldn't I put them in a trunk?

Q. The trunks down there are used for other purposes. Now, what did your wife do about there?

A. She took care of me and my family.

62 Q. Did she work for the company?

A. No; she did not.

Q. Was she under salary by the company?

A. Not that season.

—. In the season of '87?

A. No, sir.

Q. You swear that she was not?

A. Yes, sir.

Q. What girl or man had charge of the care of that building?

A. There was a woman by the name of Mrs. Kelly that swept the hallways and that took care of Mr. Stone's, the book-keeper's, room, which was on the third floor.

—. Did Mrs. Kelly have the keys of the rooms?

A. She got a key of Mr. Stone when she wanted to make his bed.

Q. Did she have the keys of the house?

A. No, sir.

Q. Who held those keys?

A. Each party that held a room held the keys.

Q. I am talking about the first floor.

A. Mr. Stone had those keys.

Q. What did he do?

A. Book-keeper.

Q. His office right there?

A. Yes, sir.

63 Q. And he was the hotel clerk, wasn't he?

A. No, sir; he was the Rocky Point Excursion Grounds clerk.

Q. If a man wanted to hire a room in this house he would have to hire it of Mr. Stone?

A. He would have to go to some one else. We had none. This committee wanted to stay there over night and we had to send them out of the grounds.

Q. Why did you have to send them away?

A. Because we don't keep rooms.

Q. You have rooms there to let for sleeping purposes?

A. No, sir.

Q. And hadn't that summer?

A. No, sir; not while I have been there.

Q. Where did they go to after they landed?

A. They went direct up there.

Q. Did you see them go there?

A. Yes, sir.

Q. You know they went there?

A. Yes, sir; I saw them on the piazza, and I started to go up there to see what was the matter.

Q. How many Odd Fellows were on the piazza then?

A. I couldn't tell you.

Q. About how many?

A. The crowd seemed to be at the door.

64 Q. The Odd Fellows were in uniform?

A. Some of them were.

Q. Did you see many of those who were in uniform on the piazza?

A. No, sir; I don't know that I noticed any of them. While I was going under this gateway the piazza came down.

Q. Why didn't you go up there to tell them not to go on the piazza?

A. I went up there as soon as I saw what the trouble was—that they were up there.

Q. What was the trouble?

A. I went up there to find out. It was unusual to see such a large crowd there.

Q. Did you tell Mason that this large crowd was in the house when you saw them in the house for ten or fifteen minutes?

A. No, sir; they were on the piazza. I said it was from ten to fifteen minutes after they landed when the piazza went down. They couldn't step right from the boat on to the piazza.

Q. We are not getting down quite so fine as that.

A. I thought you were.

Q. Th-y went down as fast as they could?

A. All except these three that staid at the gate about the tickets.

Q. If you saw Odd Fellows there and saw this crowd going up, why didn't you stop them from going up?

A. My attention was not directed towards the house until

65 I saw this crowd go up.

Q. But it was easy to see them going up?

A. I didn't notice where they were going until I saw them going up the run.

Q. Will you tell the jury what other place there is to go to, for visiting societies and their guests, at Rocky Point, except that place?

A. We have a bowling-alley, a skating-rink, and ice-cream hall, and a dance-hall, sometimes down in the woods, and a pavilion.

Q. You can sit on the rocks, I suppose?

A. Yes, sir; and no extra charge.

Q. What other place is there on the grounds?

A. There is a water-closet—two of them.

Q. That has been used extensively by more of the stockholders?

A. We have it for the public.

Q. What else have you beside- the water-closet?

A. We have several attractions down there.

Q. And what place is there that a society and their guests can go, other than these buildings that you have mentioned?

A. There is not any building.

Q. This is the only building approaching a hotel upon the grounds?

A. I don't understand that it has anything to do with a hotel.

66 Q. Now, there is a building just west of the bowling-alley, isn't there?

A. North of the bowling-alley.

Q. But is there a building just west of the bowling-alley?

A. There is the animal cage just west.

JOHN E. CONLEY sworn.

(By Mr. BRENNAN:)

Q. Mr. Comley, where do you reside?

A. I reside in Warren.

Q. In this State?

A. Yes, sir.

Q. How long have you resided there?

A. Resided there a long time.

Q. Born there, were you?

A. Yes, sir.

Q. Were you at Rocky Point in July, '87?

A. I was.

Q. In what capacity?

A. I was there in the capacity of chairman of the committee of Irish Nationalists in this State.

Q. And in that capacity did you see Mr. Mason or Mr. Buffum?

A. I did.

Q. What time in July was that?

67 A. Well, I saw him the fore part of July, and we made definite arrangements with the company on the 9th day of July, for an excursion on the 12th day of August.

Q. Now, if you will state to the jury the arrangements concerning the hotel which you made.

A. Well, in their arrangements there were certain rooms let to this committee to be used by the committee, and also for the guests of the committee, without any particular limits as to the number that we were to bring there. Beyond that, there were no arrangements made.

Q. What part of this Rock cottage or hotel were you to have?

A. At the time the arrangements were made there was no rooms designated, but after that we had the two rooms looking towards the coliseum or the center of the grounds.

Q. There was no limit as to the particular number that you could bring into Rock cottage?

A. No; there was no limit. It was given to the committee for their use and their guests.

Q. Now, in regard to things being furnished in that hotel. Were the liquors furnished you by Mason or the company?

A. Well, I can state this; that refreshments, such as sassaparilla, tonic, and soda, and things of a non-intoxicating nature, were furnished by the company.

Q. Where?

A. At this place, on the morning of the excursion.

68 Q. Have you mentioned all that was furnished by the company?

A. All that I know of my own knowledge.

Q. There were other things there?

A. There were other things there; yes, sir.

Q. Were there other articles there that were not purchased by the committee?

A. That I couldn't positively swear to. I don't know.

Q. Were any of these rooms let at this time that you mentioned—within a day or two—for sleeping purposes for any of your committee?

A. The night before I gave a letter of introduction to Mr. John McCusker and another to Mr. Williams, of Central Falls, and Mr. Buffum furnished them with rooms at the Rock cottage, so called, on the night of the 11th.

Q. And they slept there?

A. Well, I don't know; I suppose they did.

Q. But he didn't claim that it was not a hotel at that time?

A. No, sir; he didn't.

Q. You went there on the excursion in August, afterwards?

A. I did.

Cross-examination (by Mr. MINER):

Q. Do you know whether, in order to accommodate these two men, they took a policeman's room there?

69 A. No; I don't.

Q. Did you know that the policeman of the grounds had a room in that building?

A. In that cottage?
Q. Yes.
A. No; I didn't.
Q. When did these two men go down there?
A. On the 11th day of August.
Q. The night before the excursion?
A. Yes.
Q. And what you heard is that he gave them a room for that night?
A. That is all, sir.
Q. Because they were there?
A. Yes.

JOHN W. MCCUCKER sworn.

(By Mr. BRENNAN):

Q. Where do you reside?
A. Phenix.
Q. And you have resided there how long?
A. About nineteen years.
Q. Were you on this committee, Mr. McCucker, that Mr. Conley speaks of?
A. No, sir.
Q. Had you anything to do with it on the 11th or 12th of July?
70 A. No, sir; but I was sent there on the 11th of August.
Q. Did you remain at Rocky Point that night?
A. Yes, sir.
Q. Where?
A. In Rock hotel, I understood them to say.
Q. Were you alone?
A. No, sir; there was another gentleman with me.
Q. And the other gentleman and yourself slept in Rock cottage of the hotel that night?
A. Yes, sir.
Q. What time did you leave there the next day?
A. The next day was the day of the excursion. I think it was about seven o'clock, as near to it as I can tell.
Q. In the evening?
A. Yes.
Q. Where did you get your supper that night?
A. I got my supper where the help eats, in under the dining-room.
Q. And your breakfast?
A. The same place.
Q. What was going on at this hotel during the day?
A. Of the excursion?
Q. Yes.
A. I was on the games committee. I wasn't around the hotel at all in the day.

71 Cross-examination (by Mr. MINER):

Q. What time did you arrive there on the 11th of August?

A. I couldn't exactly tell, but I think we left here on the last boat. I think it was five o'clock.

Q. Got down there what time?

A. I think about six o'clock.

Q. Do you know who generally occupied this room that you slept in that single night?

A. Well, I was informed that there was a policeman slept in there.

Q. A policeman on the grounds?

A. Yes, sir.

Q. Then he simply gave up his room for one night to accommodate you two people who had come down there, did he?

A. I believe so.

Redirect (by Mr. BRENNAN):

Q. What story did you sleep in?

A. I think it was the second story.

Q. Who was the policeman? Did you see him?

A. Yes, sir; I am acquainted with him. I think his name is Mr. Platt, of Natic.

72 Q. Did you observe how many bed-rooms there were on that floor?

A. Well, there was quite a number.

Q. About how many?

A. Well, I couldn't exactly state, but I noticed numbers over the doors.

Q. The rooms were all numbered then, were they?

A. I think they were.

Q. Do you know the number that you occupied?

A. Well, not exactly.

And said cause was continued to the June term, 1889, to wit, August 9th, 1889, when the following judgment was entered:

Judgment.

It is considered by the court here that the plaintiff have and recover of the defendant corporation the sum of ten thousand dollars debt and costs of court, taxed at ——.

73 *Petition for a Writ of Error. Filed Aug.* 14, 1889.

The said Continental Steamboat Company, a corporation duly organized under the laws of the State of Rhode Island, respectfully represents that at the June term, 1889, of said court judgment was rendered against it in favor of the plaintiff for the sum of ten thousand dollars and the costs upon the verdict of the jury therein.

That the said defendant excepted to the rulings of the law in said case and to the charge of the court to the jury, as fully appears in the bill of exceptions filed in said cause.

That said defendant desires to have the judgment of said court reversed on writ of error and proceedings stayed during the pendency thereof.

Wherefore the said defendant prays that a writ of error may be allowed in said cause, returnable to the next term of the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the second Monday of October next.

CONTINENTAL STEAMBOAT COMPANY,
By its attorney, WM. G. ROELKER.

AUGUST 15TH, A. D. 1889.

Let a writ of error issue.

LE BARON B. COLT,
Judge of the Circuit Court.

74 Circuit Court of the United States, District of Rhode Island.

TIMOTHY KELLY
vs.
CONTINENTAL STEAMBOAT COMPANY.

Writ of Error.

UNITED STATES OF AMERICA, *District of Rhode Island,* } *sc:*

[L. S.] The President of the United States of America to the judges of the circuit court of the United States for the first circuit and district of Rhode Island, Greeting:

Because that in the record and process and also in the rendering of a judgment in a suit before you or some of you, between Timothy Kelly, plaintiff, and The Continental Steamboat Company, defendant, in a plea of the case, a manifest error has intervened, to the great damage of said defendant, as has in its complaint been stated, and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in their behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in
75 the suit aforesaid, with all things concerning them and this writ, so that you have the same before the Supreme Court of the United States on the second Monday in October next, at Washington, being the present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville Weston Fuller, our Chief Justice, at Providence, in said district, this 15th day of August, A. D. 1889.

HENRY MARSH, JR.,
Deputy Clerk.

Return on Writ of Error.

Circuit Court of the United States.

DISTRICT OF RHODE ISLAND, *sc:*

And now here the judges of the circuit court of the United States in and for the district of Rhode Island make return of this writ by annexing hereto and sending herewith, under the seal of said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, Henry Pitman, clerk of said circuit court in and for the district of Rhode Island, have hereto set my hand and the seal of said court this 13th day of September, A. D. 1889.

Seal of Circuit Court, Rhode Island.

HENRY PITMAN, *Clerk.*

(Over.)

A copy of the within writ of error was lodged in the clerk's office, circuit court, for Timothy Kelly, the defendant in error, August 15th, 1889.

HENRY PITMAN, *Clerk.*

76 *Citation upon Writ of Error. Issued August* 15, 1889.

UNITED STATES OF AMERICA, *District of Rhode Island,* } *sc:*

[L. S.] The President of the United States of America to the marshal of said district or to his deputy, Greeting:

You are hereby requested to make known to Timothy Kelly, of Boston, in the district of Massachusetts, that in a certain cause in the circuit court of the United States within and for the district of Rhode Island, wherein he was plaintiff and The Continental Steamboat Company defendant, wherein judgment was rendered against the defendant on the 9th day of August, A. D. 1889, the said defendant has this day sued out a writ of error unto the Supreme Court of the United States, next to be holden at Washington, in the District of Columbia, on the second Monday in October next.

And the said Timothy Kelly is therefore cited and admonished to appear at our Supreme Court to show cause, if any there be, why the judgment rendered against the Continental Steamboat Company, in said writ of error mentioned, should not be corrected and why speedy justice should not be rendered to the parties in that behalf.

Witness the seal of said circuit court and my hand this 15th day of August, A. D. 1889.

LE BARON B. COLT,
Circuit Judge.

77 UNITED STATES OF AMERICA, }
District of Rhode Island, } *sc:*

PROVIDENCE, *August 16th*, 1889.

On the 16th day of August, 1889, in the city of Boston, I served this citation on Timothy Kelly, plaintiff within named, and on August 20th, 1889, on John M. Brennan, Esq., attorney of record of said Timothy Kelly, by reading the original to each in their presence and hearing and delivering to each a true and attested copy of this citation; and say I am a disinterested person in said suit, and am United States marshal for the district of Rhode Island.

SAMUEL L. BLAISDELL,
U. S. Marshal.

DISTRICT OF RHODE ISLAND:

AUGUST 20TH, 1889.

The within writ was served on me, and all questions of authority are hereby waived by me.

JOHN M. BRENNAN,
Att'y of Record for Timothy Kelly.

DISTRICT OF RHODE ISLAND, }
Providence, } *sc:*

In Providence, this 7th day of September, A. D. 1889, before me personally appeared the above-named Samuel L. Blaisdell and made oath to the truth of the statements contained in the return made by him above to this citation.

HENRY MARSH, JR.,
U. S. Commissioner, District of R. I.

78 *Bond. Filed August 15th*, 1889.

Know all men by these presents that we, the Continental Steamboat Company, a corporation duly created under the laws of the State of Rhode Island and located and doing business in the city of Providence, therein, as principal, and John W. Slater, of North Smithfield, in the State of Rhode Island; Charles F. Mason, and Earl Phillip Mason, both of said Providence, Rhode Island, as sureties, are held and firmly bound unto Timothy Kelly, of Boston, in the Commonwealth of Massachusetts, in the sum of twenty thousand dollars (20,000), to be paid to the said Timothy Kelly, his executors and administrators;

To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals. Dated this 14th day of August, A. D. 1889.

Whereas the above-named Continental Steamboat Company prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States within and for the district of Rhode Island:

79 Now, therefore, the condition of this obligation is such that if the above-named Continental Steamboat Company shall prosecute its said writ of error to effect and answer all costs and damages, including just damages for the delay, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CONTINENTAL STEAMBOAT COMPANY, [L. S.]
By GEORGE H. BUSIEL, *Assistant Treasurer.*
JOHN W. SLATER. [L. S.]
CHARLES FELIX MASON. [L. S.]
EARL PHILIP MASON. [L. S.]

(Words "including just damages for the delay" being first interlined before the ensealing hereof.)

W. G. ROELKER.

Approved:

LE BARON B. COLT,
Circuit Judge for the First Judicial Circuit.

August 15th, 1889.

80 UNITED STATES OF AMERICA, }
District of Rhode Island, } *ss:*

CLERK'S OFFICE U. S. CIRCUIT COURT,
AT PROVIDENCE, *September 14th,* 1889.

I, Henry Pitman, clerk of the circuit court of the United States for the first circuit and district of Rhode Island, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause Timothy Kelly *vs.* Continental Steamboat Company, in said circuit court determined.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Providence, in said district, on the day and year above written, and of the Independence of the United States the one hundredth and fourteenth.

Seal of Circuit Court, Rhode Island.

HENRY PITMAN, *Clerk.*

Endorsed on cover: Case No. 13,692. Rhode Island C. C. U. S. No. 122. The Continental Steamboat Company, plaintiff in error, *vs.* John H. Burke, administrator of Timothy Kelly, deceased. Filed October 2, 1889.

Office Supreme Court U. S.
FILED.
JAN 11 1893
JAMES H. McKENNEY,
CLERK

Case No. 13,692.

Supreme Court of the United States.

OCTOBER TERM, 1892. TERM NO. 122.

CONTINENTAL STEAMBOAT COMPANY,

Plaintiff in Error,

VS.

JOHN H. BURKE,

Administrator of Timothy Kelly.

In Error to the Circuit Court of the United States, District of Rhode Island.

BRIEF FOR THE PLAINTIFF IN ERROR.

WILLIAM G. ROELKER,

Of Counsel for Plaintiff in Error.

CASE NO. 13,692.

Supreme Court of the United States.

OCTOBER TERM, 1892. TERM NO. 122.

CONTINENTAL STEAMBOAT COMPANY, Plaintiff in Error,

vs.

JOHN H. BURKE, Administrator of Timothy Kelly.

In Error to the Circuit Court of the United States, District of Rhode Island.

BRIEF FOR THE PLAINTIFF IN ERROR.

I. STATEMENT OF THE CASE.

This was an action at law on the case for alleged negligence, brought originally by Timothy Kelly a citizen of Boston and the Commonwealth of Massachusetts, against the Continental Steamboat Company, a corporation created by the General Assembly of the State of Rhode Island, and located and doing business therein, before the Circuit Court of the United States for the District of Rhode Island, to recover damages for personal injuries sustained by the plaintiff. The plaintiff's declaration contains but one count, and alleges that the defendant corporation at Rocky Point

in said District of Rhode Island on the 26th day of July, A. D. 1887, "had established and used and improved and kept to be opened and used a certain hotel at said Rocky Point, situated in the Town of Warwick in said District, for use by the public and for the usual purposes of a hotel and for hire, which said hotel and the platform surrounding the same the said defendant was then and there, during all that time aforesaid, bound and obliged to keep in a safe and suitable condition and repair for such purpose and use by all persons properly and rightfully upon and using the same; yet the said defendant, at Warwick aforesaid, on the 26th day of July, A. D. 1887, so carelessly and negligently kept and managed the platform surrounding the said hotel and upon which the plaintiff was obliged to go to enter the said hotel that the same was then and there, during all said time, insecure, unsafe, and defective and out of repair by reason of want of necessary support to the said platform; and the plaintiff having occasion to pass along and upon the said platform so adjoining the said house or hotel as aforesaid, and being lawfully and properly upon the same as an excursionist, upon the defendant's invitation as a common carrier of passengers for hire, on said 26th day of July, A. D. 1887, without fault or neglect on his part was precipitated violently to the ground a distance of to wit, 15 feet, by reason of said platform giving way, and thereby injured," &c. (See record, page 1.)

It appears that the defendant in 1887 operated a line of steamboats from the city of Providence on Narragansett Bay, as common carrier for hire, and also maintained grounds at Rocky Point on the Bay; that the Florists' Club of Boston made arrangements with the defendant to carry their Club to Rocky Point and return, and to give them dinner there, and also to furnish a room for headquarters for the committee of the Club, on the grounds. (See testimony of Michael H. Norton, record, p. 4; A. Livingston Mason, record, p. 10; Benjamin Buffum, record, p. 21). That on the evening before the excursion the committee from the Club brought down some liquid refreshments to the grounds, a two-horse load of

whiskey, gin, soda, &c. (See record, pp. 10, 11.) That Mr. Mason, the manager, objected at first to the supplies being on the grounds at all, it being against the rules, but finally consented to their being brought in and stored in the room designated for the headquarters of the Club on condition that they should not allow more than five or six people up there at a time, as it was to be used only as the committee room of the society. He testifies, (p. 11), "At the time the stuff arrived I objected to its being on the grounds at all. I said it was against our rules, and we don't have anything of the kind and don't allow anything of the kind to be on the grounds by any society of any name or nature. I told him he would have to take it off, at first, and after that they said they wanted it for their own people, and I said that if they took it up in a room there and would make a certain agreement with me I would let them have it under those conditions, and they agreed to the things which I said. That agreement was that they should allow only five or six people up there at a time; that it was a committee room and that the society should not go there at all as a society. As they were their guests, if they chose to have a few go up there at a time, I said five or six, I was perfectly willing, as the stuff had arrived there. . . . . I was speaking to Mr. Welsh, who seemed to be the head man of the committee. He represented to me that he was the head of the committee, that was all—that he had powers."

On the arrival of the boat containing the Florists' Club, of which the plaintiff Timothy Kelly was one, it appears that the dining hall where the dinner had been arranged to be provided and was awaiting the party, was in full view and directly in sight from the wharf, (see record, pp. 12, 13), and that the whole society or club, including the plaintiff, immediately upon landing proceeded in a body in a different direction from the dining hall to the building where the liquor had been stored, without any invitation from anybody, (see record, pp. 4 and 7), for the purpose of obtaining liquid refreshments. (See Michael H. Norton, record, pp. 4, 5, 6.

Timothy Kelly, p. 7.) That on reaching the building the whole party, numbering about 250 persons, (see record, pp. 17 and 24) went upon the piazza or platform surrounding the building, when it came down under them and the accident occurred.

Upon the question as to whether the building to which the piazza was attached was a hotel or not, the plaintiff offered the testimony of two witnesses to the effect that on the night of the 11th of August John McCusker and Mr. Williams had been furnished with a room in the same building and allowed to sleep there over night. (See testimony of John E. Conley and John W. McCusker, record, pp. 31–33.) But it also appeared that they were a committee for a society that was to come down there the next day, and that a policeman on the grounds accommodated them by giving up his room to them for that night only in order that they might sleep there. (See record, p. 34.) Further than this, except that several of the plaintiff's witnesses call the building a hotel, the plaintiff offers no evidence to show that it was a hotel. The defendant, on the other hand, introduced testimony showing that this building was the office building of the Company, in which their superintendent, Mr. John Brannegan, lived with his family, and that the remaining rooms in the house were occupied by various help employed about the grounds by the Company. That it was not an inn or hotel, and never had been such; that it was a private building devoted to the private uses of the Company, and not for the use of excursionists upon its grounds, who had no business there; that there were one or two rooms on the ground floor that were occasionally assigned to various organizations coming to the place as a committee-room, where the various committees could sit down and count their tickets, cast up their accounts, &c. (See A. Livingston Mason, pp. 10 and 11; Benjamin Buffum, p. 21; John Brannegan, p. 23.) That the room which was assigned to the Florists' Club on the occasion of the accident for use as a headquarters for the committee, and where they had been allowed to store their liquor with the understanding that not more than five

or six persons should go there at a time—was an old store-room about 9x13 feet in size; that the public had no use of this building at all. (See Mason, p. 13.)

It further appeared that the timbers and supports of the piazza or platform which gave way were covered with boards, and to all external appearance were perfectly sound, (see record, p. 12) and that the defendant's manager, Mr. Mason, had occupied the house and used the piazza the season before with his own family; that the defendant's superintendent, Brannegan. and his family occupied and used the house and piazza at the time of the accident, as also did the help and servants in his employ, and that the offices of the Company, in the management of its business, were there. Record, pp. 12, 14, 20, 24, 25).

In this state of the proof the defendant presented certain requests in writing for instruction to the jury to the judge presiding at the trial, which he denied. The requests are set forth below.

A verdict was found for the plaintiff and the defendant duly excepted.

II. ASSIGNMENT OF ERRORS.

The plaintiff in error doth assign the errors complained of in the trial of said cause, as follows:

After the evidence was closed at the trial of the said cause, and before the judge presiding charged the jury therein, the defendant presented the following requests in writing, or prayers for instructions to the jury, and requested the judge presiding to give them as instructions to the jury, to wit:

First. The plaintiff having declared that the piazza was attached to a hotel, he must prove it a hotel. There is no evidence in the case tending to prove that the building was a hotel, and there is evidence that it is not a hotel. The jury should be instructed to find for the defendant.

Second. That if the jury find upon all the evidence in the case that this building to which the piazza was attached was not a hotel, they must find for the defendant. And the judge presiding refused so to charge as requested, and denied both of the said requests and prayers for instructions.

Whereupon and before the jury retired from the bar, after receiving the charge of the court, the defendant duly excepted to the refusal of the court to charge the said several requests and prayers for instructions, and said exceptions were duly noted by the court at the time of the making thereof.

All of which said refusals to charge as aforesaid the plaintiff in error doth now assign as errors in said cause.

III. ARGUMENT.

The only question raised by the record for the consideration of this Honorable Court is whether, if the plaintiff failed to prove that the piazza, which fell down and caused the plaintiff's injuries was attached to a hotel, it was a fatal variance between the allegations of the declaration and the proof. It is true that there are two exceptions, in one of which the Court was requested to instruct the jury that the plaintiff had introduced no evidence tending to prove that the piazza in question was attached to a hotel, whereas the defendant had introduced testimony tending to show that it was not a hotel; and that therefore the plaintiff had failed to prove it a hotel and that the verdict should be for the defendant. It is submitted that this prayer was justified by the evidence; but it is unnecessary for the purposes of this hearing to consider this point at length.

The second instruction requested was, that the jury must find from the evidence that it was a hotel; otherwise they must find for the defendant, and the only question necessary to be considered is whether this point was well taken in point of law.

Before proceeding to the consideration of the main question it may be well to note that under Section 914 of the Revised Statutes of the United States, "the practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." An examination of the Rhode Island Public Statutes will show that the practice, pleadings and forms and modes of proceeding existing in the State of Rhode Island within which said circuit court was held were those of the common law practically unmodified by any statute, code or practice of the State.

The circuit court and this court will take judicial notice of the Statutes of the States, (*Hanley* vs. *O'Donoghue*, 116 U. S. 6; *4th Nat. Bank* vs. *Francklyn*, 120 U. S. 751); and in the absence of any statutory modification it will be presumed that the common law such as it existed in England at the time of the emigration of our ancestors, so far as applicable to their circumstances, is the law of the State.

Patterson vs. *Winn*, 5 Pet. 232.
Casheart vs. *Robinson*, *id.* 264, 280.
White vs. *Knapp*, 47 Barb. 59.
Holmes vs. *Broughton*, 10 Wend. 75.
Johnson vs. *Chambers*, 12 Ind. 102.

It will thus be seen that the question at issue in this case must be determined by the rules of the common law, and without any modification or change by any modern statute or code.

The question then, is, was it a fatal variance?

It is submitted that the failure of the plaintiff to prove that the piazza was attached to a hotel "then and there established, used and improved, and kept to be open and, used for use by the public

and for the usual purposes of a hotel and for hire," as alleged in his declaration, constituted a fatal variance for the following reasons:

First. Because the allegation was of the substance of the issue in the case;

Second. Because the allegation in the declaration that the platform was attached to a hotel was a descriptive allegation.

I.

The allegation was of the substance of the issue.

The requisites of a good declaration in an action for negligence in Rhode Island are clearly stated by Durfee, C. J., in *Smith* vs. *Tripp*, 13 R. I., p. 153, as follows: "The requisites of a good declaration in an action for negligence are well stated by Willes, J., in *Gautret* v. *Egerton*, L. R. 2 C. P. 371, 374. 'It ought,' he says, 'to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others.' So, too, it is not enough to state a relation from which the duty may arise under certain circumstances, but, unless the duty necessarily results from the relation, the circumstances which give rise to it must likewise be stated. *Brown* v. *Mallett*, 5 C. B. 599; *Seymour* v. *Maddox*, 16 Q. B. 326; *Wilson* v. *Newberry*, L. R. 7 Q. B. 31; *Collis* v. *Selden*, L. R. 3 C. P. 495; *Williams* v. *Hingham, &c., Turnpike Company*, 4 Pick. 341, 345."

Applying this test to the declaration in the case at bar it will be observed that the only duty alleged by the plaintiff to have been due from the defendant to him with reference to the platform which fell with him and caused injuries, arises from the allegations in the declaration that:

"The plaintiff kept and maintained to be opened and used a certain hotel at Rocky Point for use by the public and for the usual purposes of a hotel for hire, which hotel with the platform surrounding the same the defendant was then and there bound and obliged to keep in a safe and suitable condition and repair for such purpose and use by all persons properly and rightfully upon and using the same, and that the plaintiff having occasion to pass along and upon said platform and being lawfully and properly upon the same as an excursionist upon the defendant's invitation, was injured," &c.

In other words it is a declaration against the defendant as an inn keeper who, invited the plaintiff into his public inn or hotel and thereby became liable in the law to see that his inn and the piazza surrounding the same was in a safe and suitable condition.

On this declaration the fact that it was in fact a public inn is of the very gist of the action..

"It being necessary to prove the substance of the issue, it follows that any departure from the substance in the evidence adduced must be fatal."

Greenleaf Ev. vol. 1, sec. 63, 15th ed.

"The rule is that whatever cannot be stricken out without getting rid of a fact essential to the cause of action, must be retained, and of course must be proved, even though it be described with unnecessary particularity."

Greenleaf Ev. vol. 1, sec. 63, 15th ed.
Bristow v. *Wright*, Doug. 668.
Peppin v. *Solomons*, 5 T. R. 496.
Williamson v. *Allison*, 2 East. 444.

"When the plaintiff's right consists in an *obligation on the defendant to observe some particular duty*, which may be founded either on a contract between the parties, or on the obligation of

law arising out of defendant's particular character or situation; and the plaintiff must prove such duty, as laid, and a variance will, as in action on contracts, be fatal. . . . . .

When it is founded on the obligation of *law*, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which gave rise to the defendant's particular duty or liability; as in actions against sheriffs, carriers, innkeepers, &c."

Chitty Pl. vol. 1, *383, 11th Amer. ed.
5 T. R. 149, 150.
1 Saund. 311 c. n. 2.
12 East. 89.

"In an action on the *case* founded on an express or implied *contract* as against an attorney, agent, carrier, innkeeper or other bailee, for negligence, &c., the declaration *must correctly state the contract* or the particular duty or consideration from which the liability results, and on which it is founded; and a variance in the description of a *contract*, though in action *ex delicto*, may be as fatal as in an action in form *ex contractu*."

Chitty Pl. 11th Amer. ed., vol. 1, *384.
Ireland v. *Johnson*, 1 Bing. N. C. 162.
Brotherton v. *Wood*, 6 Moore, 141.
3 Brod. & Bing. 54.
9 Price, 408.

"The declaration in such case usually begins with a statement of the particular profession or situation of the defendant, and his retainer and consequent duty or liability." See the ordinary forms for declarations.

"The declaration will be defective if it do not show that by express contract, or by implication of law in respect to the defendant's peculiar character or situation, &c., stated by the plaintiff,

the defendant was bound to do, or omit the act in reference to which he is charged."

12 East. 89.

The King v. *Everett*, 8 B. & C. 114.

Edwards v. *Bennett*, 6 Bing. 235.

"Declarations for the breach of *duty* to which the defendant was subject in respect of his particular character or situation are against carriers or innkeepers, for refusing to carry goods or to receive a guest or for the loss of goods; . . . . . in these cases the particular situation of the defendant from which his duty and liability arise must be concisely stated."

12 East. 89.

8 B. & C. 114.

2 M. & R. 35, same case.

Chitty, Pl. *384.

"Where some statement upon the subject is necessary, and it cannot be rejected *in toto*, the variance in the detail is a ground of nonsuit, although such minute description was not essential."

Thus per Lawrence, J., 8 T. R. 308.

"Even if it be not necessary in general for the party to show that he has regularly taken his degree, in this case it was necessary, because the plaintiff alleged in his declaration that he had *duly taken the degree* of doctor of physics."

Chitty Plead. 11th Amer. ed., vol. 1, *385.

"It is also a rule, that if a necessary inducement of the plaintiff's right, &c., even in actions of torts, relate to and describe and be founded on a matter of *contract* it is necessary to be strictly correct in stating such contract, it being matter of description."

Chitty Plead., vol. 1, *385.

Dougl. 664.

1 B. & B. 538.*

1 Esp. Rep. 302.

12 East. 452.

2 Marsh. 485.

"In an action of tort founded on contract, every particular of the contract is descriptive, and a variance in the proof is fatal. As in an action on the case for deceit in a contract of sale, made by the two defendants, proof of a sale by one of them only, as his separate property, was held insufficient; for the joint contract of sale was the foundation of the joint warranty laid in the declaration and essential to its legal existence and validity."

Greenleaf Ev. vol. 1, sec. 64, 15th ed.
Weall v. *King et al.*, 12 East. 452.
Lopez v. *De Tastel*, 1 B. & B. 538.
Ashley v. *Wolcott*, 11 Cush. 192.

"Where an action of tort is founded on a contract, a variance from the contract alleged will be as fatal as in an action on the contract itself, for the tort founded on the contract cannot be the same unless the contract be the same."

3 Starkie Ev. Met. ed., vol. 3, * 1547.

"Every allegation in an inducement, which is material and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal."

Chitty on Plead., vol. 1, *292.
4 B. & C. 380.
6 D. & R. 500, same case.
Dougl. 667.
5 T. R. 498.
3 B. & P. 463.
2 Chit. Rep. 311.
Steph. Pl. 2d ed. 285.

"The inducement, or averment by way of introductory allegation is particularly proper where a party is charged upon or in respect of, the breach of a contract or implied duty, resulting from any particular character or capacity of the defendant. Thus in a declaration against an attorney for negligence, or a carrier, a

coach proprietor, a wharfinger, or captain of a ship, or an innkeeper, for the loss of goods, &c., it is usual and proper to show by way of inducement, or at least by other averments in the declaration, that the defendant followed the occupation in respect of which the plaintiff employed him. If no such allegation be contained in the declaration, the defendant cannot be charged thereon for the breach of a duty which results only from the particular character which he held, and in reference to which he was retained."

Chitty Plead. 11th Amer. ed., vol. 1, p. 291.
Dartwell v. *Howard et al.*, 4 B. & C. 345.
6 Moore, 154.*
2 New Rep. (B. & P.) 365, 454.
12 East. 89.

The case of *Mason* vs. *Staples*, 71 Me. 316, 39 Amer. Rep. 318, is on all fours with the case at bar.

In this case there was held to be a fatal variance, between the allegations and the proof where the declaration was against the defendant as an innkeeper, and averred that he kept a common inn, and having received the plaintiff into said inn together with his money and watch and chain and a ring, said property was wrongfully taken and carried away and wholly lost to him. But the evidence showed that the money was taken from a bath house, standing upon the seashore or beach while the plaintiff was absent bathing in the sea. The court say, per Walton, J.: "This suit is against the defendant as innkeeper. The declaration avers that he kept a common inn, and received the plaintiff into said inn, together with his money, and a watch and a chain, and a ring; and that while the plaintiff was a guest therein, with his said money, watch, chain and ring, said property was wrongfully taken and carried away and wholly lost to him. Such are the material averments in the declaration. But the evidence shows that the property was taken from a bath house, standing upon the seashore, or beach, at a considerable distance from the inn, while the plaintiff was absent

bathing in the sea. We think there is a fatal variance between the allegations and the proof; and that under such a declaration, and with such evidence, the plaintiff cannot recover. We do not find it necessary to consider, and of course we do not undertake to determine what the rights and liabilities of the parties would be under a different declaration. All we mean to decide is that under such a declaration and with such evidence the action is not maintainable."

See also *Wabash Western Ry Co.* v. *Friedman*, Supreme Ct. of Illinois. 30 Northeastern Reporter, pages 353–5.

This was an action to recover damages for personal injuries sustained by the plaintiff while a passenger on the defendant's road. In his declaration he alleges that he became a passenger at Kirksville for Glenwood Junction. He testified that he became a passenger at Moberly for Ottumwa. It having been objected that this was a fatal variance it was held, per Craig J., as follows:

"It may be said that the question involved is a technical one, and hence not entitled to that consideration which a court should give to a question which goes to the merits of an action. The plaintiff had the right when the question was raised, to amend his declaration and thus obviate the difficulty; but he saw proper to take another course, and he occupies no position now to complain, should the rules of law that control in such cases be strictly enforced against him. But while the question involved may be regarded somewhat technical, still it will be remembered that the plaintiff is seeking to recover a large sum of money, and the defendant has the right to demand and insist that the grounds upon which the plaintiff claims a right of recovery should be clearly and concisely stated, and that the case made on the declaration should be proven as laid. If a plaintiff may allege in a declaration one ground of recovery, and on the trial prove another, a defendant never could be prepared for trial. One great object of a declaration is to notify the defendant of the nature and character of the

plaintiff's demand, so that he may be able to prepare for a defence; but if one ground of action may be alleged, and another proven, a declaration may be a delusion, and, instead of affording a defendant notice of what he was called upon to meet, it would be a deception. Here the plaintiff claimed that the relation of a passenger and common carrier existed between him and the defendant, and that the defendant owed him a duty growing out of that relation," and after quoting the passages from Ch. on Pl., quoted above, the Court proceeds as follows:

"It may, however, be said that the statement in the declaration of the point from which and to which the plaintiff was being carried was mere inducement, and need not be proved as laid. Upon a question of this character Chitty on Pleading (page 292) says: 'In general, however, every allegation in an inducement, which is material and not impertinent and foreign to the cause, and which, consequently, cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal; and, consequently, great attention to the facts is necessary in framing the inducement, and care must be taken not to insert any unnecessary allegation.' If, therefore, the allegation is to be regarded as inducement, it was necessary to prove it as alleged. And at page 385 the author further says: 'It is also a rule that if a necessary inducement of the plaintiff's rights, &c., even in actions for torts, relate to and describe and be founded upon a matter of contract, it is necessary to be strictly correct in stating such contract; it being matter of description. Thus, even in case against a carrier, if the termini of the journey which was to be undertaken be misstated, the variance will be fatal. Here the allegation in the inducement relates to matter of description.'

"*Harris* v. *Rayner*, 8 Pick. 541 is a case in point.

"The action was brought to recover for an injury sustained by the oversetting of a stage coach. The plaintiff alleged in his declaration that he paid defendants for his passage in their stage from Albany to Boston, $10, the usual fee for said passage, and defendants in consideration thereof undertook and promised carefully to

transport plaintiff in said passage from Albany to Boston. In support of the declaration plaintiff proved that he rode in a stage coach from Worcester to Boston, and that just as he arrived at Boston the coach was overset by the carelessness of the driver, and he was thereby injured. It was held that the evidence did not prove the contract set out in the declaration, and in passing upon this point the Court said: "We think there was no sufficient proof at the trial of the contract as alleged in the declaration. The declaration alleges a contract on the part of the defendants to transport the plaintiff from Albany to Boston. The proof was that the plaintiff rode in defendant's stage from Worcester to Boston; and, although this is part of the route from Albany to Boston, yet it is part also of many other lines of travel. So that the contract alleged remains without proof.'

"In *Tucker* v. *Cracklin*, 2 Starkie 385, and in *Railroad & Banking Co.* v. *Tucker*, 79 Ga. 128, 4 S. E. Rep. 5, actions were brought against carriers for the loss of goods; and in each case it was held that a variance between the proof and allegation as to the termini of the carriage was fatal.

"In *Phillips*, Ev. (Vol. 3, p. 268) the author says: 'The plaintiff will be non-suited if the termini of the journey are not correctly set forth.'

"In *Railroad Co.* v. *Sutton*, 53 Ill. 398, the point was made that an averment in the declaration of the defendant's undertaking to convey the plaintiff from West Urbana to Tolono is not sustained by proof of an undertaking to convey from Champaign City to Tolono. In disposing of the question of variance, it is said: 'It would appear from the testimony that West Urbana and Champaign City are one and the same place; consequently there was no variance.'

"The averment in plaintiff's declaration that he became and was a passenger at Kirksville, to be carried to Glenwood Junction, for reward, was in effect a statement that he took the defendant's train at Kirksville for Glenwood Junction, and that he had paid or was ready to pay his fare from one point to the other when called upon,

whereupon there was an implied contract on the part of the railway company to safely carry him from one point to the other. We think it plain that the averment in plaintiff's declaration was not sustained by proof that he became a passenger at Moberly for Ottumwa. It may be true that plaintiff stated more in his declaration than he might have stated: that he might have relied upon an allegation that he was a passenger upon defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's line of road. But, having gone into detail in his allegation, the law requires him to prove them as laid.

"What is said in *Bell* v. *Senneff*, 83 Ill. 125, is in point here: 'As a general rule a party is required to prove the averments of his pleadings as he makes them. He may aver more than is required; but as a general rule, he must prove them, although unnecessarily made.'

"In *Derragon* v. *Rutland*, 58 Vt. 128, 3 Atl. Rep. 332, it was held that every averment which the pleadings make material as a descriptive part of the cause of action must be proved as alleged; and any variance which destroys the legal identity of the matter or thing averred with the matter or thing proved, is fatal.

"In *State* v. *Copp*, 15 N. H. 212, it is said: 'It is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can be rejected.'

"See also 1 *Phillips*, Ev. pp. 709, 710; Stephen Pl. p. 124, appendix. Here the plaintiff was bound to allege that he was a passenger on defendant's train of cars for reward. This was material, and the further averment that he became a passenger at Kirksville for Glenwood Junction was descriptive of the identity of that which was legally essential. It could not be rejected or disregarded. In conclusion, we think it plain, under the authorities, that there was a variance between the proof and the declaration; and the court erred in the admission of the evidence, and in the modification of defendant's instruction. Judgment reversed and cause remanded."

Bristow v. *Wright*, 2 Dougl. 665. At 667, Ld. Mansfield says:

"If the very ground of the action be misstated, as where you undertake to recite that part of a deed on which the action is founded and it is misrecited, that will be fatal. For then the case declared on is different from that which is proved and you must recover *secundum allegata et probata*. This will reconcile all the cases. In the present case the plaintiff undertakes to state a case and states it falsely. I will mention three (which are very strong) where matter, which it was unnecessary to set forth, being stated and not proved, the variance was held to be fatal."

Cudlip v. *Rundal*, 2 W. & M. Carth. 202.
Savage v. *Smith*, 2 Blacks. 1101.
State v. *Hornsey*, E. 19 Geo. 3.

"The plaintiff in an action of covenant alleged that the defendant had not treated the farm in a husbandlike manner, but on the contrary thereof *had committed waste*. The defendant pleaded that he had not committed waste, &c., and issue being taken on this plea, it was held that the plaintiff could not go into evidence to show improper treatment of the farm short of the commission of waste." 2 Burr. 904.

"Here it is to be observed that as the only breach in issue was the commission of actual *waste*, a term of known legal import, acts of bad husbandry not amounting to acts of waste could not constitute *any part* of the breach in issue."

Hartley v. *Harriman*, 1 Barn. & Ald. 620. Declaration alleged defendant kept dogs known and accustomed to attack, hunt, chase, bite, worry and kill sheep. Proof showed dogs were accustomed to attack men.

Ellenborough, C. J., said: "Unless it be inferred that a dog accustomed to attack men is *ipso facto* accustomed also to attack sheep, there is no evidence to support this declaration. He might, perhaps, have stated his ground of action more generally by alleg-

ing that these dogs were of a ferocious nature and unsafe to be left at large, and there is evidence sufficient to show that defendant possessed knowledge which would have imposed on him the duty of tying them up. But here the plaintiff has stated a particular habit, and it does not appear clearly that the dogs had that habit, or, that if they did, the defendant knew it. There must, therefore, be a new trial."

Abbott, J., in the same case said: "I am of the same opinion. It is not necessary to decide now whether a declaration in a different form might not have been sufficient, and might not have been sustained by the present evidence. For it is clear that in its present form one material allegation has not been proved."

Holroyd, J., in same case: "If the allegation as to the habit of these dogs were struck out of the declaration a sufficient cause of action would not remain. Then it follows that it is material and absolutely necessary to be proved. And it will not do to prove another fact, which, if inserted in the declaration instead of this, might have been quite sufficient to support the action. For the allegation itself must be proved."

So a declaration for the sale and delivery of pine timber is not supported by evidence of the sale and delivery of spruce timber.

See *Robbins* v. *Otis*, 1 Pick. 368.

So in an action for an injury sustained by the oversetting of the defendant's stage coach, an allegation of a contract to transport the plaintiff on the coach from Albany to Boston is not sustained by a proof of a contract to carry him from Worcester to Boston.

Harris v. *Rayner*, 8 Pick. 541.

So in an action against a town for injuries sustained on a highway, an allegation that the plaintiff was violently thrown from a

wagon upon the ground by reason of a defect in the highway, is not supported by proof that he voluntarily leaped from the wagon to avoid coming in contact with a fence.

Lund v. *Inhabitants of Tyngsboro,* 11 Cush. 563.

There is a material variance between the declaration and the proof where the declaration avers that a man was driving at the time the vehicle was overthrown by negligence, while the proof shows that a young lady was driving.

See *Cowan* v. *Muskegon R. R. Co.*, 84 Mich. p. 585, per McGrath, J. "The declaration avers that Call was driving at the time of the accident while the proof shows that the young lady was driving, and the declaration contains no averment that she was exercising due care. Not only is there a material variance between the declaration and the proof, but the declaration fails to set forth a cause of action. Judgment reversed and new trial granted."

Where the declaration claims damages for obstructing a water course and the evidence does not establish the existence of such water course, the variance is sufficient ground of reversal.

See *Chicago & Alton R. R. Co.* v. *Henneberry*, 28 Ill. App., p. 112, where C. B. Smith, J., says, "There is another reason why this judgment must be reversed. The declaration alleges that a water course crossed plaintiff's land, and that water flowed through the water course, and that the defendant obstructed this water course. We do not think the evidence shows the existence of a water course. There is therefore a variance between the pleadings and the proof. For the foregoing reason the judgment is reversed and remanded."

The plaintiff who by alleging facts makes them material, although they would not have been material otherwise, is not entitled to recover if he fails to prove such immaterial facts as alleged.

See *Dexter* v. *Ohlander*, 7 Southern Rep. p. 116, where McClellan, J., says: "The plaintiff in the first count of the complaint alleges and thus assumes the burden of proving that he agreed to surrender and did surrender the lease to the defendant, and in the second count it is negatively alleged that the contract so declared on required a surrender and delivery of possession to the defendant, and that plaintiff in compliance with this contract did so surrender possession to Dexter. The plaintiff thus took upon himself to prove these facts, which we think are not material to his rights in the abstract, but only as he has asserted them; and if he fails to prove a surrender of the possession to the defendant he is not entitled to recover under the first count; and if he fail to prove a surrender of the possession to the defendant he is not entitled to recover under the second count; and if the jury had found that he had surrendered neither the lease nor the possession to the defendant, he is not entitled to recover at all."

Also *Wright* v. *Chicago & N. W. R. R. Co.*, 27 Ill. App. p. 207, per Garnett, J. "The evidence did not tend to support the first three counts. They charged that the explosion which caused the destruction of the plaintiff's property came from petroleum, &c., stored in defendant's warehouse running along the *Easterly* line of plaintiff's building, while all the evidence introduced on the point showed that defendant's warehouse, where the oil was stored and from whence the explosion was alleged to have proceeded, was *South* from the plaintiff's building. This is a fatal variance." See cases cited.

Also see *Chicago, Burlington & Quincy R. R. Co.* v. *Morkenstein*, 24 Ill. App. 131, per McAllister, J. "In describing the tort complained of and the means by which it was effected the plaintiff has alleged in each of the counts of his declaration that while he was upon a public highway of the city of Chicago and in the exercise of the legal common right to be and travel thereon, he was unnecessarily and unavoidably run against, &c., by defendant's

locomotive and train. The rule is that where a pleader, though needlessly, describes the tort and the means by which it is effected with minuteness and detail, and the proof substantially varies from the statement there will be a fatal variance and the plaintiff will fail in the action. (*Morse* v. *Johnston*, *22 Ill., 633; City of Bloomington* v. *Goodrich, 88 Ill. 558*; *L. S. & M. S. Ry.* v. *Beam, 11 App. 215*).

The plaintiff's evidence not only failed to support the allegations respecting such public highway, but the affirmative evidence on the part of the defendant clearly established the fact that there was no public highway at the place where the plaintiff received his injury, but that he was at the time in the defendant's yard, which is private property, upon no purpose of business with the defendant, and therefore a trespasser. Upon this view it is apparent that the 4th instruction given on behalf of the plaintiff was erroneous, because it submitted to and authorized the jury to find for the plaintiff upon a cause of action substantially variant from that described in either count of his declaration. Not only that, but it submitted to the jury the question of the wilful tort on the part of the defendant, its servants and agents when there was not evidence sufficient to go to the jury on that question. Judgment reversed."

And see also *Gurley* vs. *Missouri Pacific Ry. Co.*, 12 West. Rep., p. 332, per Black, J. "Plaintiff cannot declare upon one cause of action—upon one negligent act, and recover upon another and an entirely different act of negligence. To permit this to be done is to disregard all rules of pleading."

See cases cited.

This declaration expressly and in terms avers that the building was a public inn or hotel kept and maintained by the defendant for public use by all persons for hire, and that the plaintiff was there upon the invitation of the defendant. The proof shows that no express invitation was extended by the defendant to the plaintiff and

his associates to go to the building in question, but that they proceeded immediately upon landing at the wharf up onto this piazza in a body without invitation from anyone, for the purpose of obtaining refreshments which had been stored there the night before under the agreement made between their committee and the manager of the defendant corporation. The original contract between the defendant and the Florists' Club, of which the plaintiff is a member, was for the transportation by the defendant's boats from Providence to Rocky Point and return, for a dinner there for the association, and for a headquarters room for their committee. This agreement was so far modified, on the arrival of the liquid refreshments the night before, by arrangement between their committee and Mr. Mason, the manager, that they were permitted to store their refreshments in the committee room with the understanding that not more than five or six of them at a time were to go there. The transportation had been furnished them and it appears that a dinner was awaiting them in a dining hall in plain sight of the place where they landed. If, therefore, they went in a body from the wharf up onto this piazza in the building where the headquarters room had been furnished, without invitation, it becomes of the very essence of the issue what the character of the building was. If, as the plaintiff alleges in his declaration, it was a hotel kept open there by the defendant for the use of the public, for hire, then there was an implied invitation on the part of the defendant to the plaintiff, and to all others who were there as excursionists upon the grounds to go up onto the piazza for the purpose of entering the hotel, and it was the duty of the defendant to use all proper care that the piazza should be strong enough to support any number of persons who might, being properly upon the ground as excursionists, without special invitation, see fit to go upon it for the purpose of becoming guests at the hotel or using it as such. If, on the other hand, it was a private building, used only as an office building by the defendant company, and as a place of dwelling and lodging for its servants, where the public had no business, then there was no implied invitation on the part of the defendant to the plaintiff and his

associates to go there, and they owed no duty to him in the premises whatsoever, except in so far as by special agreement with the Florists' committee made the night before, they were to have the privilege of introducing their members there in small numbers, five or six at a time. And if the plaintiff and his associates violated the terms of that restriction and came in a large body onto the piazza for the purpose of entering the building, then they exceeded the terms of the invitation which was held out by the defendant to them to go there, and became trespassers to whom the defendant owed no duty as to the security of the piazza.

Furthermore the proof shows that so far as could be seen the supports and timbers of the piazza were sound, and that the defendant, its agents and servants, were in the use and occupation of the building as their private office building, and as a place of lodging, with impunity. A piazza might be sufficiently strong and proper under all circumstances for such uses as these, and not strong enough for the outside of a hotel where large bodies of people might from the nature of things naturally be expected to repair at any time for the uses of a hotel. The degree of care which the defendant would be called upon to exercise in the one case would be entirely different from the degree of care which it would be called upon to exercise in the other, if it be held that he owed any duty at all to the plaintiff in the premises.

II.

Because the description of the building to which the piazza was attached as laid in the declaration is a descriptive allegation which must be strictly proved as laid.

The plaintiff need not have described the building as a hotel, perhaps, but having done so he is bound by it. An allegation of a piazza falling which was attached to a hotel is not supported by proof of a piazza falling attached to some other building which was

not a hotel; that is not the same issue which the defendant was called upon to meet by the pleadings; nor will a judgment on a record showing that the piazza which fell and caused the injuries was attached to a hotel, be a bar to another suit brought for the same cause of action alleging that the piazza was attached to some other building not a hotel.

Allegations of matter of essential description, "must be proved with a degree of strictness, extending in some cases even to literal precision. No allegation, descriptive of the identity of that which is legally essential to the claim or charge can ever be rejected."

Greenfield Ev. vol. 1, sec. 56, 15th ed.

Starkie's Ev. page *1529, vol. 3, Metcalf's Edition. "It is a most general rule that no allegation which is *descriptive* of the *identity* of that which is legally essential to the claim or charge can ever be rejected. Were it otherwise, and if proof could be admitted which varied from the record, in consequence of the omission to prove any allegation descriptive of an essential particular, it is plain that the proof would no longer agree with the cause of action, or charge alleged, to *any extent;* they would differ throughout in respect of that descriptive allegation; and as the proof would be more general than the allegations, it would no longer be partial proof of the same charge or claim, but of a different and more general one. As an absolute and *natural* identity of the claim or charge alleged with that proved consists in the agreement between them, in *all* particulars, so their *legal* identity consists in their agreement in all the particulars legally essential to support the charge or claim; and the identity of those particulars depends wholly on the proof of the allegations and circumstances by which they are ascertained, limited and described. To reject any allegation *descriptive* of that which is essential to the charge or claim would obviously tend to mislead the adversary. The Court in giving judgment on a general verdict could never be sure that those facts had been proved which were essential to support their judgment; and the

record would afford but very uncertain evidence as to the identity should the same matter be again litigated."

"For instance, if in an action for breaking the plaintiff's close, he were to describe it as abutting on the several closes A, B, C and D, these would all be allegations descriptive of that which was material, that is, of the subject-matter to which the injury was done, and a variance from any would be fatal. *Supra, 1436, tit. Trespass; 2 East. 500.* For if the allegation that the *locus in quo*, abutted on the close A could be rejected as immaterial, the other abuttals might also be disregarded. Evidence would then be admitted of a trespass in an entirely different close; the defendant might come prepared to rebut the charge of trespass, as far as regarded the close described, but be wholly unprepared to justify an entry into any other close; and the record would afford no evidence, or what is worse, might mislead in case of future litigation between the same parties. So, if a man were to be charged with stealing a *black* horse, the allegation of color, although unnecessary, yet being descriptive of that which is material, could not be rejected; to admit evidence that he stole a *white* one would not be to prove a *part* of that alleged, but to prove an offence in respect of a subject-matter proved to be different."

"The very omission to prove the boundaries in the former case, or the color in the latter, would be fatal, although different boundaries, or different color, should not be proved, for neither the trespass nor the larceny proved could be considered to be the same with that alleged, until the allegations descriptive of identity were proved; that is, whilst the proof was general, but the description special; for so long it would be possible that the subject-matter proved was wholly different from that alleged.

"It seems indeed to be an universal rule, that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which, in point of description, limitation and extent, he has prescribed for himself; he selects his own terms, in order to express the nature

and extent of his charge or claim: he cannot, therefore, justly complain that he is limited by them; to allow him to exceed them, would, for the reasons adverted to, be productive of the greatest inconvenience."

See Starkie's Ev. at page *1542.

"In the next place it is clear that no averment of any matter essential to the claim or charge can ever be rejected. And this position extends to all allegations which operate by way of *description* or *limitation* of that which is material. Let an averment of this kind be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the identity of that which is material." *Vide supra, 1529.*

Thus where the plaintiff in an action against the sheriff for taking his lessee's goods in execution without leaving a year's rent, alleged that the rent was payable by four quarterly payments, it was held that this allegation, although unnecessary, must be proved.

Bristow v. *Wright*, Dougl. 666.

Here the necessary averment that rent was due was limited by the allegation to rent payable quarterly.

The plaintiff in an action against his lessee for negligently keeping his fire *per quod*, the premises were burnt, alleged that he was tenant under a demise for seven years, whereas he was but tenant at will, (*Cudlipp* v. *Rundle*, Carth. 202; Dougl. 666,) and the variance was held to be fatal. Here the injury was to the plaintiff's reversionary interest; the fact of tenancy was essential; and the averment that it was a tenancy under a demise for seven years operated as a limitation and description of that which was material.

Where a common informer, in an action of debt against a sheriff's officer, in his declaration alleged a judgment, and a *fieri facias* upon that judgment, it was held that he was bound to prove

the judgment as well as the writ, although it was unnecessary for the plaintiff to have alleged the judgment at all.

Savage q. t. v. *Smith*, 2 Bl. Rep. 1101, cited by Lord Mansfield, in *Bristow* v. *Wright*, Dougl. 666.

Here again the allegation of the judgment, which was immaterial, operated by way of description and limitation of the writ, which was material.

So in an action for double rent on the statute, *11 Geo. II*, c. 19, s. 18, where the declaration alleged a lease for three years, and it appeared in evidence that the lease being by parol was void, and that the defendant was but a tenant from year to year.

Shute v. *Hornsey*, K. B. East. 19 Geo. III, cited by Lord Mansfield, Doug. 666.

"All these cases turned on the plain and simple principle that as the superfluous and unnecessary matter *limited* and *described* that which was material, it thereby became part of that which was material and could not be rejected.

"So in justifying the taking of cattle in damage feasant, in which case it is sufficient to allege that they were doing damage in the defendant's freehold, should he needlessly state a seisin in fee, which is traversed, the precise estate which he has set forth becomes an essentially descriptive allegation, and must be proved as laid. See Leke's case, Dyer 365; *Turner* v. *Eyles*, 1 B. & P. 456; *Rex* v. *Dendy*, 1 E. & B. 835, per Crompton, J. Therefore if a person be indicted for stealing a live fowl, he cannot be convicted upon evidence showing that he had stolen a dead one. See *Rex* v. *Douglas*, R. & R. 497. Or if an allegation be made of the color of an animal, though wholly unnecessary, it is a matter of description, and must be proved as laid. See 1 Starkie's Ev., 434. So in an indictment for bigamy which describes the second wife as a widow, when she is not a widow, the misdescription is fatal, though it was entirely unnecessary to state that she was a widow, or anything more than her name. See *Rex* v. *Deeley*, 1 Moo. C. C. 303."

In *Rogers et al.* v. *Allen*, 1 Camp. 309: "Partial proof of that which is claimed by prescription is insufficient, although the proof fail only as to a part which is not material on the trial. Thus, where the defendant in an action of trespass described for a right of fishery in four specified places, but proved the right to exist in three of them only, the variance was held to be fatal, although no trespass was proved in the excepted part."

In this case Heath, J., overruled the objection, but the court of K. B. afterwards granted a new trial. See also

Rotherham v. *Green*, Noy 67.

Congers v. *Jackson*, Clayt. 19.

"Where the plaintiff stated that he was the proprietor *and editor* of a newspaper calumniated by the defendant, it was held to be insufficient to prove merely that he was proprietor."

Starkie Ev. vol. 3, p. *1551, Met. ed.

Heriot v. *Stuart*, 1 Esp. C. 437, Cor. Kenyon, C. J.

Also *Stevens* v. *Aldridge*, 5 Price 234 or 334.

In *Hare* v. *Cator*, Cowp. 766, "Where the lessor of an estate to A. B. declared in covenant against the defendant as the assignee of *all* the demised estate, and on a traverse of the assignment, as in the said declaration mentioned, it appeared in evidence that the defendant was assignee *of a part only* of the demised estate, the variance was held to be fatal."

Nor can the fact that in the latter part of the declaration the building is described as a "house or hotel," affect the case. In the first place in the declaration it is the *said* platform so adjoining the *said* house or hotel *as aforesaid*, being of course the "certain hotel established and used and kept to be opened for use by the public for the usual purpose of a hotel and for hire, and the platform surrounding the same," theretofore counted on in the declaration.

The words "house" and "hotel" are synonymous in universal parlance.

Schouler's Bail. 252.

"In almost universal parlance, 'hotel,' like 'house,' in the public sense now signifies simply a genteel inn."

City of St. Louis v. *Siegrist*, 46 Mo. 594.

"The distinction, in respect to inn and tavern keepers, observed in England, under the common law, does not exist with us, and different names are applied to them, though 'hotel' and 'house' are usually and commonly used to denote a higher order of public houses than the ordinary tavern or inn."

54 N. Y. 316, *People* v. *Jones*.

"A 'Hotel' is an inn or house for entertaining strangers or travellers. An 'Inn' is a house for the lodging and entertainment of travellers."

An indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank bills *or* promissory notes payable to the bearer thereof, and purporting to be signed by the President and Directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them; it being manifest that "promissory note" was used merely as explanatory of "bank bill" and meant the same thing.

Brown v. *Commonwealth*, 8 Mass. 59.

An information was held sufficient which alleged that the defendant feloniously stole, took and carried away a mare "of a brown *or* bay color." The colors named in the information meant the same.

State v. *Gilbert*, 13 Verm. 647.

The word house is superfluous and may be treated as surplusage. The description of the property is sufficiently certain without it.

The rule of law is that if the indictment or information can be supported without the words which are bad, they may on arrest of judgment be rejected as surplusage.

1 Chit. C. L. 143; *id.* 195-6.

"Or" may be used in the sense of "to wit," explaining what precedes. In this sense an indictment may adopt the words of a statute, as a "bank bill *or* promissory note," a horse of a "bay *or* brown color;" but "spirituous or intoxicating liquor" may be bad for uncertainty.

Anderson's Dict. of Law; *Or*,
2 Gray 502, cases.
7 Gratt. 592.

"*Or*" may be used to join as alternatives different terms expressing the same thing or idea, as: this is a sphere *or* globe.

See Webster's International Dict. 1890.

"In *Lewis* v. *Hitchcock*, per Brown, J., "In *Gleason* v. *Mc Vicar*, 7 Cow. 43, it is said by the Court in relation to allegations under a videlicet, if they be impossible or contrary or repugnant to the preceding matter, they shall be rejected as surplusage and void. 2 Saunders, 298, note 1.

Under this rule, if a restaurant cannot possibly be an inn, the description under a videlicet would be rejected as repugnant to the previous statement that the place was an inn. For the reason above stated, however, there is no necessary repugnance between the two, and I consider the full statement taken together as an equivalent of an averment that the place referred to, though called a restaurant, was in fact an inn, and the complaint in this respect is therefore held sufficient."

10 Fed. Rep. p. 7.

Respectfully submitted,

WILLIAM G. ROELKER,

Of Counsel for plaintiff in error.

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Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 122.

THE CONTINENTAL STEAMBOAT COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN H. BURKE, ADMINISTRATOR OF TIMOTHY KELLY, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Brief on behalf of the Defendant in Error.

JOHN H. BURKE,
M. F. MORRIS,
Of Counsel for Defendant in Error.

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I.

STATEMENT OF CASE.

This is a suit instituted by Timothy Kelly, a citizen of Massachusetts, the original plaintiff in the cause, to recover damages for personal injuries sustained by him through the negligence of the defendant Steamboat Company, a corporation of the State of Rhode Island, now the plaintiff in error.

It appears that the Continental Steamboat Company

maintained a resort (a sort of picnic grounds) for excursions at a place called Rocky Point, in the town of Warwick, in the State of Rhode Island; that upon the grounds was a house or hotel used by the company in part for an office, in part as a place of residence for some of its employés, and in part for the use of persons resorting to the place; that annexed to this "house or hotel" was a platform or piazza, to which excursionists resorted, and which was allowed to become in an unsafe condition; that on the 26th of July, A. D. 1887, a number of excursionists from Boston, among whom was the plaintiff Kelly, participated in an excursion to Rocky Point upon tickets sold to them by the defendant company; that soon after the arrival of the excursionists the plaintiff Kelly, with a number of other excursionists, was upon the platform mentioned, the supports of which had rotted away, by reason of which the platform fell and the plaintiff and others were precipitated to the ground and severely injured. For his injuries (which finally proved fatal) the plaintiff sued, and recovered damages to the amount of $10,000, and this writ of error has been sued out to reverse the judgment of the Circuit Court.

The only question raised by the bill of exceptions in the case is, that there was no proof to show that the house to which the piazza or platform was attached was in fact a hotel, and that, therefore, the plaintiff was not entitled to recover. The only testimony that appears in the record is that which is presumed to bear upon this point. The injury, so far as the record shows, is conceded; and the unsafe condition of the structure (whether it be termed a "house" or "hotel") and the negligence of the defendant are likewise conceded, and there is no pretense that the issue in the case was not fully, fairly, and honestly tried.

II.

BRIEF OF ARGUMENT.

Counsel for defendant in error can scarcely suppose that the plaintiff in error is serious in the advancement of the exceptions taken by it. The single point raised seems to be so frivolous that we are justified in regarding it as raised merely for delay. There is every reason to suppose that the exception was taken, and the writ of error sued out merely for delay. And if we are right in this we would respectfully suggest that the case is one where the Court might properly enforce its rule providing penalties for such writs of error.

Two instructions were asked for by the plaintiff in error, of which the first was as follows :

"The plaintiff having declared that the piazza was attached to a hotel, he must prove it a hotel. There is no evidence in the case tending to prove that the building was a hotel. The jury should be instructed to find for the defendant." (R. p. 3.)

The second instruction asked was:

"That if the jury find upon all the evidence in the case that this building to which the piazza was attached was not a hotel, they must find a verdict for the defendant."

This was clearly an attempt to sidetrack the real issue in the case, which the court justly refused to permit. The word hotel was used in the declaration merely to distinguish it from the bowling alley or other building on the grounds, and this is evident from the fact that the declaration uses the term "house or hotel," as well might it have been termed the mansion.

But the assumption of fact in these requests is unjustified and the conclusion of law is unwarranted.

There is evidence tending to show that this building was a hotel.

1st. The jury viewed the locus of the accident (R. p. 2) and lithographic views of the premises and grounds were exhibited to the jury (R. p. 13). Who can tell the influence of this?

2nd. There was testimony showing that this was a large building (defendant company admits 16 or 18 rooms, R. p. 14), and one witness testified that there were quite a number of bedrooms. (Rec., p. 34.)

That the rooms were numbered on the doors like those of a hotel (R. p. 34.) That several of the rooms in this building were assigned to these excursionists to be used as headquarters, whatever that may mean. (R. p. 34.)

That dinner was to be provided for the excursionists by this company. (R. p. 4.)

That the company, that same summer, had provided rooms for strangers in which to sleep in this same building. (R. p. 32.)

That other strangers had been provided by the company with rooms and with breakfast and supper there. (R. p. 33.)

In view of this testimony is it surprising that counsel should name the building a hotel. Indeed the attempt of the defendant company to show that this house and these premises was not a hotel is pitiful in the extreme.

What is a hotel? Webster defines a hotel to be "a house for the entertainment of strangers or travellers." There is no law to prescribe that it shall be of large size or that it shall contain more than 16 or 18 rooms.

But this question as to whether this building was a hotel or not is of no earthly consequence. It is not even a collateral issue. The term is used as one merely

of designation. The plaintiff uses the expression "house or hotel" in his declaration and should not be confined to the word hotel.

But even if he were so confined, and if he was wrong in designating the building a hotel, and if the proof were overwhelming that the building was not a hotel, what has that to do with the case, considering the issue that was being tried?

This place was kept as a place of public common resort, it was maintained for hire, for profit by the defendant company. The plaintiff Kelly was rightfully upon these premises, upon the invitation of the defendant, he having paid the charges established by the company. He was injured by the falling of a piazza or platform attached to a building upon these premises which was negligently allowed to be in a rotten, unsafe, and dangerous condition. He was in the exercise of due care, and had a right to expect that reasonable care would be exercised by this company in protecting him from harm while upon their premises. By the failure of the company in this respect he met his injury. These were the issues that were to be tried, and there is no pretense that the case was not fully presented to the jury upon these issues. This being established, this makeshift defence ought not to be permitted to prevail.

The jury was fully and intelligently instructed as to the law of liability and damage, evidently to the satisfaction of the defendant company, as there was no objection taken or raised to the instructions given to the jury.

We respectfully submit that the judgment of the Court below should be affirmed.

JOHN H. BURKE,
M. F. MORRIS,
Of Counsel for Defendant in Error.